Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2000

Daniel C. Crane, Bar Counsel, *et al. Petitioner*

v.

Donald K. Stern, *Respondent*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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September, 2000

QUESTIONS PRESENTED

1. Does the requirement of the Citizens' Protection Act that federal prosecutors abide by state and local district court rules of ethics apply to a district court rule of ethics governing the subpoenaing of attorneys to testify about their clients?

2. Did the court of appeals err by taking the unprecedented step of rejecting a district court's interpretation of a local rule of ethics that avoids conflict with other aspects of federal law and substituting an interpretation that maximizes the conflict?

PARTIES

In addition to Daniel C. Crane, Bar Counsel for the Commonwealth of Massachusetts, the other petitioners, who were parties to the proceeding in the court whose judgment is sought to be reviewed are: the United States District Court for the District of Massachusetts; William G. Young, in his official capacity as Chief Judge of the United States District Court for the District of Massachusetts; and Joseph L. Tauro, Robert E. Keeton, Rya W. Zobel, Mark L. Wolf, Douglas P. Woodlock, Edward F. Harrington, Nathaniel M. Gorton, Richard G. Stearns, Reginald C. Lindsay, Patti B. Saris, Nancy Gertner, Michael A. Ponsor, and George A. O'Toole, Jr., in their official capacities as United States District Judges for the District of Massachusetts.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

Daniel C. Crane, Bar Counsel, *et al. Petitioner*

v.

Donald K. Stern, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Daniel C. Crane, Bar Counsel for the Commonwealth of Massachusetts, respectfully petitions for a writ of certiorari to review the judgment of the United Sates Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 214 F.3d 4 (1st Cir. 2000) (App., *infra*, 1a-27a). The order of the en banc court of appeals denying the petitions for rehearing and the suggestions for rehearing en banc, with a dissenting opinion, is reported at 214 F.3d 21 (1st Cir. 2000) (App., *infra*, 27a-31a). The opinion of the district court is reported at 184 F.R.D. 10 (D. Mass. 1999) (App., *infra*, 32a-50a).

JURISDICTION

The court of appeals entered its judgment on April 12, 2000 and denied rehearing en banc on June 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 3.8(f) of the Rules of Professional Conduct of the Supreme Judicial Court of Massachusetts provides:

> [The prosecutor in a criminal case shall] not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

The Citizens' Protection Act, 28 U.S.C. § 530B, provides:

> § 530B. Ethical standards for attorneys for the Government
>
> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

STATEMENT OF THE CASE

This case concerns the validity of a local district court rule of professional ethics, incorporated by reference from the rules of ethics of the Supreme Judicial Court of Massachusetts, regulating the process by which a prosecutor may subpoena an

attorney to testify about a client. The United States Attorney for the District of Massachusetts challenged the facial validity of the rule in an action for declaratory and injunctive relief, asserting jurisdiction under 28 U.S.C. §§ 1331,1345 & 2201. The district court upheld the validity of the rule. The court of appeals reversed in an opinion that conflicts with one from the Tenth Circuit in a case construing a very similar rule. The en banc court denied rehearing, with three of the five judges who voted dissenting.

A. The Background of Rule 3.8(f)

In early 1986, the judges of the United States District Court for the District of Massachusetts incorporated into their disciplinary rules, a provision promulgated by the Supreme Judicial Court of the Commonwealth of Massachusetts, PF 15, limiting a prosecutor's use of subpoenas to obtain information from lawyers about their clients. PF 15 provided:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.[1]

After the district court adopted PF 15, the United States Attorney's Office for the District of Massachusetts challenged its authority to impose such a rule, claiming that it conflicted with federal law governing subpoenas, grand jury secrecy and the operation of the grand jury. These claims were rejected by the district court in an opinion affirmed by the First Circuit. *See United States v. Klubock*, 639 F. Supp. 117 (D. Mass. 1986) *aff'd United States v. Klubock* (*Klubock I*), 832 F.2d 649, 658 (1st Cir. 1987) vacated by *United States v. Klubock*,

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[1] The type of abuse that led to the adoption of PF 15 had its genesis in the federal system. *See In Re Grand Jury Subpoena*, 1986 U.S. Dist. LEXIS 17185 (D. Ma. 1986) (Opinion of Judge Young noting the government's agreement on the origins of PF 15).

832 F.2d 664 (1st Cir. 1987) (*Klubock II*) (en banc by an equally divided court). The First Circuit had an opportunity to revisit the issue in *Whitehouse v. United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1st Cir. 1995). *Whitehouse* considered a local rule of the District Court for the District of Rhode Island very similar to PF 15, which also required federal prosecutors to obtain judicial approval before they could serve a subpoena on an attorney to compel evidence concerning a client. Adopting the reasoning of the decisions in the *Klubock* litigation, the court in *Whitehouse* upheld the validity of the rule in the face of a challenge that raised the same issues as those in *Klubock II*.

PF 15 did not cause the disruption in the grand jury process that the United States Attorney's Office predicted in the litigation that resulted in *Klubock II*. In the ensuing years under the procedure mandated by PF 15, the United States caused literally hundreds of subpoenas to be served on attorneys. In the four years documented by the record in this case, federal prosecutors obtained approval to serve 321 subpoenas on lawyers. *See* Affidavit of Donald K. Stern, ¶ 7 (Jt. App. 37). The cases which have involved such a practice occupy a significant place in the criminal business of the district court.[2] In none of those cases did a judge ever disapprove a request for a subpoena or was a prosecutor ever subjected to discipline for violating PF 15. *Id.* at ¶ 11 (Jt. App.

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[2] In the four years from September 30, 1993 to September 30, 1997, a period almost coterminous with the four years covered by the affidavit filed by the United States Attorney in the District Court, the criminal docket of the District Court reflects a total of 1447 cases. *See* Federal Judicial Business Statistics, Admin. Office of the United States Cts., (309 cases in year ending Sept. 30, 1994; 402 cases in year ending Sept. 30, 1995; 384 cases in year ending Sept. 30, 1996; 352 cases in year ending Sept. 30, 1997). During the four years from November 1993 to December 31, 1997, approval was obtained to serve 321 subpoenas on lawyers. *See* Stern affidavit ¶ 8 (Jt. App. 38). If all the subpoenas were in fact served, at a rate of one per case, then attorney subpoenas would have played a role in approximately 22% of the cases on the Court's docket. *Cf. Klubock I*, 832 F.2d at 658 (1st Cir. 1987) (estimating that attorney subpoenas in the four years prior to the adoption of PF 15 may have played a role in from 10.7% to 32.6% of the District Court's criminal caseload per year).

38-39). Moreover, despite the ethical obligations of the lawyers who received these subpoenas to raise all appropriate grounds to oppose them in order to preserve their clients' confidences, *see United States v. Edgar*, 82 F.3d 499, 507-509 (1st Cir. 1996) (noting lawyer's ethical lapse in failing to resist prosecutor's questions before the grand jury, seeking privileged information), the actions of the United States Attorneys Office went largely unchallenged after the fact as well. Of the lawyers who received these 321 subpoenas, at most ten and perhaps as few as three filed motions to quash. (Jt. App. 145-46).

Klubock II "encourage[d] the district court to monitor closely the working of PF 15, and to be receptive to experience-based proposals for improvement." *Klubock II*, 832 F.2d at 667. The district court did just that. When the Supreme Judicial Court proposed to improve the procedure governing lawyer-subpoenas and replace PF 15 with a new provision, Rule 3.8(f), the district court adopted the change. On January 1, 1998, Rule 3.8(f) went into effect.

Rule 3.8(f) differs in two respects from PF 15. First, it requires a prosecutor to have a reasonable belief about certain topics concerning the subpoena. Second, it provides that the lawyer who is the target of the subpoena shall have an opportunity to appear at the hearing where the prosecutor seeks judicial approval. Eleven jurisdictions in the United States have ethical proscriptions that either require prosecutors to get prior judicial approval to subpoena a lawyer as in Rule 3.8(f)(2) or to have a reasonable belief in the propriety of the subpoena as required by Rule 3.8(f)(1).[3] Rule 3.8(f) as adopted by the district court, requires both.

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[3] *See* ABA/BNA Lawyers' Manual on Prof. Conduct 55:1303 (Jan. 22, 1997) (listing Alaska, Colorado, Louisiana, Massachusetts, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Virginia); Local Rules of the United States District Court for the District of Puerto Rico, Appx. II, Rule 3.8 (1994).

B. Proceedings Below

The United States Attorney's Office responded to the promulgation of Rule 3.8(f) by filing an action for declaratory and injunctive relief challenging the facial validity of the rule, again contesting the authority of the district court to regulate prosecutors who seek to subpoena lawyers to testify about their clients. The complaint named both federal and state defendants. In addition to the United States District Court for the District of Massachusetts and all of its judges, the complaint named as defendants the Bar Counsel for the Commonwealth of Massachusetts, the Supreme Judicial Court of Massachusetts and the Massachusetts Board of Bar Overseers.

Bar Counsel is responsible for investigating all matters involving alleged ethical misconduct by a member of the Massachusetts Bar or by an attorney engaged in the practice of law in Massachusetts, and for prosecuting all disciplinary proceedings before the Board of Bar Overseers and the Supreme Judicial Court. In addition, under Local Rule 83.6(9) of the Rules of the United States District Court for the District of Massachusetts, Bar Counsel plays a role in the federal disciplinary process. Bar Counsel is responsible for investigating allegations of attorney ethical misconduct referred to his office by the district court and for prosecuting disciplinary proceedings before it.

In the course of this litigation in the district court, Bar Counsel filed an affidavit stating that as a matter of policy if a violation of Rule 3.8(f) by a federal prosecutor came to the attention of his office in connection with a proceeding in the United States District Court for Massachusetts, he would initiate proceedings against such a prosecutor in federal court pursuant to the applicable Local Rules, not before the Board of Bar Overseers or a state court. In addition, the affidavit stated that prosecutors who are members of the bar of the Commonwealth of Massachusetts practicing in a state or federal court outside the Commonwealth who direct the service of a subpoena on a lawyer seeking information about a client will not face any disciplinary action by the Board of Bar

Overseers based on Rule 3.8(f). As a consequence of these two policy statements, the plaintiffs dismissed their claims against the Supreme Judicial Court and the Board of Bar Overseers, since the Supremacy Clause issue with respect to state enforcement of Rule 3.8(f) became moot. *See Stern*, 214 F.3d at 9-10. (App. *infra* 6a).

As in the *Klubock* litigation, the challenge that remained in this case claimed that the rule was beyond the power of the district court because it would interfere with the functioning of the grand jury. The complaint in this case, as did the complaint in the *Klubock* litigation, predicted that the rule would breach grand jury secrecy, delay grand jury proceedings, and interfere with the grand jury's ability to subpoena witnesses. The complaint also challenged the rule insofar as it concerned the service of trial subpoenas, as being beyond the power of the district court to adopt. However, the premise of all of these claims rested on the United States Attorney's prediction that the rule would be applied to require federal prosecutors to document at an adversary hearing their reasonable belief that the information sought by the subpoena was not privileged, was essential, and was available through no other feasible means.

None of the other parties to the litigation in the district court supported the United State's Attorney's interpretation of what the rule meant or how it would be applied. Bar Counsel, the party who would investigate and prosecute any alleged violations of the rule, filed an affidavit stating that a prosecutor did not have to establish a belief in the items section (1) described at the hearing required by section (2), and thus the rule did not create any new ground for a judge to disapprove the service of a subpoena upon an attorney. The judges of the district court, who were named as defendants and who would actually implement the rule, did not take a position on its proper interpretation, arguing that it was premature to do so in the absence of a concrete case. However, they agreed that Bar Counsel's interpretation was a reasonable one. *See* United States District Court's Opposition to Plaintiff's Motion for Preliminary Injunction at 5-6. The judges also filed an affidavit from Judge Douglas P. Woodlock, who stated that he

anticipated the rule to result in no material change in prior practice under PF 15. *See* Jt. App. 108-109.

The district court upheld the validity of the rule. The court first confronted the question of its proper interpretation, agreeing with Bar Counsel that "Rule 3.8(f) does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the subpoena required by 3.8(f)(2)." *Stern v. Supreme Judicial Court*, 184 F.R.D. 10, 16 (D. Mass. 1999) (App. *infra* 43a-44a). In making that determination, the court noted that the United States Attorney "presents no reason why Rule 3.8(f) should be interpreted otherwise and absolutely no evidence, beyond bare assertion, that it will be." *Id.* Upholding the validity of subsection (2) of the rule, the court found that it would not breach grand jury secrecy or cause delay in grand jury investigations. *Id.* at 15-17. (App. *infra* 40a-46a). The court also rejected the challenge to subsection (1), holding that requiring prosecutors to have a reasonable belief about the propriety of a subpoena to a lawyer seeking evidence about a client was a proper exercise of the district court's rule making authority to enact an ethical rule governing the behavior of prosecutors. *Id.* at 19. (App. *infra* 49a-50a).

The court of appeals reversed the district court's ruling. It never reached the issue of whether the rule as interpreted by the district court was valid. Rather, it construed the rule in a way that maximized rather than minimized its conflict with other precepts of federal law. The court eschewed the application of the principle of construction that a local rule should be interpreted to avoid conflicts that would raise doubts about its validity. The court rejected the authority of Bar Counsel's interpretation and that of the district court and chose instead to accept as definitive the interpretation by the American Bar Association of the model rule from which Rule 3.8(f) was derived. The ABA's model rule contains a comment which supports the interpretation that the hearing the rule requires should address the reasonable belief of the prosecutor in the propriety of the subpoena. However, the Supreme Judicial Court omitted this sentence from its comments to the version of Rule 3.8(f) that it adopted, *see Stern*, 213 F.3d at 14 (App. *infra* 15a). Despite this difference, the court held that the rule

must still be interpreted the way the ABA intended. *Id.* Under this interpretation, the court held that the rule infringed on grand jury secrecy and would delay grand jury proceedings and was therefore not a proper exercise of the district court's rule making authority. Insofar as the rule also concerned trial subpoenas which did not raise questions about conflicts with federal law governing grand jury subpoenas, the court held that it was not within the power of the district court to adopt because it went beyond matters of detail appropriate for local rule making. In reaching this conclusion, the court applied a test that took as the relevant inquiry the question whether the rule would be apt to affect the ultimate outcome of criminal proceedings.

The court also considered the impact of the Citizens' Protection Act (CPA)[4], which went into effect after the district court's decision, on the validity of the rule. The court held that the CPA did not require federal prosecutors to obey the rule as interpreted by the court. In reaching this conclusion, the court reasoned that neither the language of the CPA nor its legislative history provided a clear enough congressional mandate that a state or local district court rule of ethics could regulate federal attorneys in a manner in any way inconsistent with preexisting federal law. The court also reasoned that in any event, Rule 3.8(f) was not the type of ethics rule to which the CPA applied.

The en banc court of appeals voted to deny a rehearing, with three judges voting in favor of rehearing the case and two judges voting against a rehearing. Since one currently active judge had recused herself, the court denied rehearing because under the internal rules of the First Circuit, recused judges are counted for purposes of determining what constitutes the absolute majority of the active members deemed necessary for en banc hearing. The three dissenting judges took the position that the panel opinion improperly reversed the earlier opinion in *Whitehouse*, and thus constituted a result appropriate only

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[4] Ethical Standards for Attorneys for the Government, Pub. L. No. 105-277, sec. 801, 530B, 112 Stat. 2681-118 (1998) (codified at 28 U.S.C. § 530B (1999)).

for the full court. The dissent also concluded that en banc rehearing was appropriate because the question of a district court's power to regulate the professional conduct of prosecutors was one of "exceptional importance." The three dissenters noted:

> There are few matters that are more central to the district court's ability to administer justice than is the prudent exercise of its supervisory powers over the bar. This is a power that has been recognized as inherent in the courts. The establishment of rules of conduct for attorneys is an integral part of this power. The talismanic word is not "grand jury" but "ethics." A member of the bar is subject to rules of conduct that govern professional actions irrespective of the forum. A prosecutor is not immunized from ethical considerations because his or her conduct takes place in connection with grand jury proceedings.

Stern, 214 F.3d at 22. (App. *infra* at 30a).

REASONS FOR GRANTING THE PETITION

I. The Panel Opinion Conflicts With an Opinion From the Tenth Circuit on the Test for Determining Whether a Rule is One of Ethics and Thus Within the Scope of the Citizens' Protection Act

The panel opinion, in determining that Rule 3.8(f) is not the type of rule that the CPA requires federal prosecutors to obey, conflicts with an opinion of the Tenth Circuit and allows federal prosecutors in Massachusetts to serve subpoenas to lawyers under circumstances that would subject federal prosecutors in Colorado to professional discipline. In *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999), the Tenth Circuit considered a challenge to the validity of the Colorado state version of Rule 3.8(f) in light of the

CPA.[5] The Tenth Circuit identified four factors that determine whether a rule is one of professional ethics: (1) does it bar conduct recognized by consensus within the profession as inappropriate; (2) does it deal with morals and principles, often in commandment form; (3) is it vague enough to cover different variations of lawyer misconduct; and (4) is it directed at attorneys. *Id.* at 1287-88. In concluding that the Colorado rule was an ethical proscription binding on federal prosecutors by virtue of the CPA, the court relied heavily on the earlier First Circuit opinion in *Whitehouse* which upheld the Rhode Island version of Rule 3.8(f).

The Tenth Circuit "easily" concluded that Rule 3.8(f) was an ethical rule in large part because it agreed with *Whitehouse* that subpoenas directed to an opposing attorney raised a serious potential for abuse.

> [W]e easily conclude that the rule is an ethical one. Most significantly, the attorney-client relationship is by general consensus of our profession worthy of protection, and the service of "an attorney-subpoena may cause irreparable damage to the attorney-client relationship." *Whitehouse*, 53 F.3d at 1358. Such a subpoena takes its toll in two ways. First, "from the moment that the subpoena is served on counsel until the issue of its validity is resolved, the client resides in a state of suspended animation, not knowing whether his attorney will testify against and perhaps be required to withdraw his representation." *Id.* That uncertainty inevitably undermines the trust and openness so important to the attorney-client relationship. Second, the "service of a subpoena opens a second front which counsel must defend with her time and resources, thus diverting both from the client." *Id.* We agree with the First Circuit, "that the defense counsel['s] *adversary* can

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[5] The Colorado rule differs from the Massachusetts rule in two respects. It applies only to trial subpoenas, not to grand jury subpoenas. And, it does not contain any provision for an adversarial hearing. It does, however, require a prosecutor to have a reasonable belief as to the same three issues concerning the subpoena as does the Massachusetts rule.

bring about these consequences raises manifest *ethical* concerns." *Id.* (second emphasis added).

Colorado Supreme Court, 189 F.3d at 1288.

The panel opinion in *Stern* is a direct repudiation of both the Tenth Circuit's approach in *Colorado Supreme Court* and the earlier First Circuit opinion in *Whitehouse* on which it was based. The *Stern* opinion concluded that Massachusetts Rule 3.8(f) is not the type of ethical rule covered by the CPA because it adds a procedural step not otherwise contemplated by federal law, the opportunity for a pre-service adversarial hearing. *Stern*, 214 F.3 at 20. Making this factor determinative is at odds with the Tenth Circuit's analysis and with *Whitehouse*. The rule that *Whitehouse* upheld, like the rule at issue in this case, also required a prosecutor to obtain prior judicial approval for an attorney subpoena. The fact that the Rhode Island rule at issue in *Whitehouse* contained the prophylactic procedural device of requiring a hearing prior to the service of a subpoena to a lawyer did not change its essential nature as a rule of ethics.

The three dissenting judges who voted to rehear the *Stern* case en banc recognized that "it is difficult to conclude that the panel opinion in *Stern* . . . is anything but a reversal of the panel opinion in *Whitehouse*." *Stern*, 214 F.3d at 21. (App. *infra* at 28a). By focusing on the fact that the Massachusetts rule requires a hearing, the panel opinion in *Stern* not only ignored *Whitehouse* but established a test for the scope of the CPA that is directly at odds with that of the Tenth Circuit.

Federal courts outside the First and Tenth Circuits in those states that have rules addressing the propriety of subpoenas directed to attorneys now have two conflicting opinions from which to choose in order to determine the scope of the ethical responsibility of the federal prosecutors who appear before them. The panel opinion in *Stern* creates confusion about the proper test to determine whether a state or local district court rule of ethics falls within the confines of the CPA.

II. The Panel Opinion Deals With an Important and Unsettled Area of Federal Law Concerning the Extent to Which the Citizens' Protection Act Requires Federal Prosecutors to Obey State and Local District Court Rules of Ethics

The panel opinion in *Stern* ignores the plain language of the CPA, the first federal law governing the ethics of prosecutors who represent the United States, and flouts the manifest intent of Congress to hold Justice Department lawyers to the same ethical standards as other attorneys. By allowing federal prosecutors in Massachusetts to disregard the ethical proscription of Rule 3.8(f) on the ground that it conflicts in some way with other federal law, the *Stern* panel limits the CPA in a manner that renders it superfluous. As the history of the fight over whether Justice Department lawyers could opt out of state and local district court ethics regulation on the ground of federal preemption shows, it was precisely those ethical rules that the Justice Department claimed *conflicted* with federal law that Congress meant to have them obey by enacting the CPA. Since federal lawyers always recognized their obligation to abide by ethics rules that did not conflict in some way with federal law, there was no need for Congress to have enacted a statute as limited in scope as the *Stern* panel has left the CPA.

The extent to which federal prosecutors are subject to state rules of ethics governing the professional behavior of lawyers has been a topic of intense national debate within the legal profession and the subject of sharp controversy between the executive and the other two branches of the federal government. The Justice Department has consistently maintained that it has the power to exempt its lawyers from state and local district court ethics regulations when it views them as impeding their federal responsibilities or conflicting in any way with federal law.[6] This position has met with a hostile

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[6] *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. Off. Legal Couns. 576, 576 (1980) ("The only restraints on federal law enforcement activities are those

reaction from many federal courts.[7] It has also been the subject of Congressional disapproval,[8] culminating in the enactment of the CPA, which is at the heart of this case.

The CPA represents the first time Congress has specifically addressed the question of the ethical standards that federal lawyers must obey. This legislation was proposed in direct response to a position the Justice Department took in

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established by the Constitution and existing statutes"); Memorandum from Richard Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989) [hereinafter Thornburgh Memorandum], quoted in *In the Matter of John Doe, Esquire*, 801 F.Supp. 478, 489-90 (D.N.M. 1992) ("The Department has taken the position that, although the states have the authority to regulate the ethical conduct of attorneys admitted to practice before their courts [citation omitted], that authority permits regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities."). The Justice Department under Attorney General Reno has taken the same position. *See* Proposed Regulation Governing Communications With Represented Persons, 59 Fed. Reg. 10,086 (March 3, 1994) ("federal attorneys generally continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices"). In 1995, the Attorney General issued formal regulations that codified the Thornburgh Memorandum. *See* Communications with Represented Persons: Final Rule, 59 Fed. Reg. 39,910 (1994) (codified at 28 C.F.R. 77.2(a) (1999) [hereinafter Reno Rules].

[7] *See United States v. Hammad*, 858 F.2d 834, 838 (2d Cir. 1988) (criticizing 1980 Office of Legal Counsel Opinion); *O'Keefe v. McDonnell Douglas*, 132 F.3d 1252, 1257 (8th Cir. 1998) (criticizing the Reno Rules); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993) (criticizing Thornburgh memo); *In the Matter of John Doe, Esquire*, 801 F. Supp. 478, 486-87 (D.N.M. 1992) (same); *United States v. Ferrara*, 847 F. Supp. 964, 968-69 (D.C.D.C. 1993) (same) *aff'd on other grounds* 54 F.3d 825, (D.C.Cir. 1995). *See also In the Matter of Howes, Esq.*, 123 N.M. 311, 320, 940 P.2d 159, 168 (N.M. 1997) (criticizing Thornburgh memo)

[8] Congress had warned the Justice Department in 1990 that it disagreed with its position on this issue, *see* SUBCOMM. ON GOV'T INFORMATION, JUSTICE, AGRICULTURE, COMM. ON GOVERNMENT OPERATIONS, *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required*, H.R,. Rep. No. 986, 101st Cong., 2d Sess. at 32 (1990)("We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules before the Federal Courts which they appear"), and indicated it would monitor the situation in the future. *See id.* at 36.

regulations it issued in 1994 allowing its lawyers to contact persons represented by an attorney.[9] In issuing this regulation, the Department claimed that it had the general power to exempt its attorneys from state ethics rules and those of local federal district courts.

The CPA was first introduced in the House of Representatives in 1996.[10] The Justice Department at the time was vociferous in its opposition, grounding its position on a claim that state and local ethics rules which conflicted with federal law in some way were not binding on its attorneys. A representative of the Department testified against the proposal, stating that:

> [t]he primary way that the [the Bill] affects federal law enforcement is by implicitly cutting back on the Attorney General's preemption power. Although the Department generally requires its attorneys to comply with state ethics rules, the Attorney General currently has the power to preempt those rules when they conflict with federal law and interfere with her ability to conduct necessary law enforcement operations.[11]

When the topic resurfaced in Congress during the appropriations debates in 1998, the proponents of the CPA focused on the need to prevent federal prosecutors from opting out of ethical regulations on the ground of a conflict with preexisting federal law,[12] while its opponents argued that the

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[9] *See* Reno Rules, *supra* n. 6.

[10] *See Ethical Standards for Federal Prosecutors Act of 1996*: HEARING ON H.R. 3386 BEFORE THE SUBCOMM. ON COURTS AND INTELLECTUAL PROPERTY OF THE HOUSE COMM. ON THE JUDICIARY, 104th Cong. 4 (1996) (*hereinafter* 1996 hearings).

[11] *See id.* at 47 (Statement of Seth Waxman, Associate Deputy Attorney General.)

[12] Supporters of the Act made it clear that it was designed to hold federal prosecutors to state ethical standards despite claims that it would interfere with federal law enforcement efforts. For example, Rep. Delahunt, a former District Attorney in Massachusetts, stated in the floor debate on the Act:

> it is necessary and appropriate that prosecutors be held to the standards of professional conduct to which other attorneys are

CPA would impose obligations on federal prosecutors that conflicted with other aspects of federal practice.[13] The Attorney General of the United States wrote a letter on the issue, claiming that the CPA would "chill law enforcement and impede the ability of the Justice Department to enforce the laws that Congress has mandated it enforce."[14]

In a gesture to the opponents of the CPA in the Senate, the conference committee which considered the legislation that contained the provision agreed to postpone its effective date for six months. In that interim period, the Senate held hearings on a substitute bill which would have explicitly inserted the preemption feature the Justice Department and other opponents of the CPA found so important.[15] At those hearings, the attempt to eviscerate the CPA was opposed by the two national organizations which represent the arms of state government which traditionally are responsible for the discipline of lawyers.[16] The Conference of Chief Justices, which represents

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> subject. I do not accept the assertion of the Department of Justice that their attorneys should be immune from these ethical rules whenever they find them unduly confining. That is what ethical rules are for.

144 Cong Rec H 7246 105th Cong., 2d Sess. (Aug. 5, 1998). *See also* Remarks of Rep. Buyer, *id* at 7236 ("Quite simply, the issue before us is whether the Government attorneys at the Department of Justice should abide by ethical rules that all other attorneys have to abide by, or can they make up their own standards of conduct.")

[13] Rep. Harman objected that "some of the state rules may be contrary to the obligations and responsibilities we may require of federal prosecutors." *Id.*

[14] *Id.* at 7246.

[15] *The Effect of State Ethics Rules on Federal Law Enforcement*: HEARING BEFORE THE SUBCOMM. ON CRIMINAL JUSTICE OVERSIGHT OF THE SENATE COMM. ON THE JUDICIARY, 106th Cong. 8 (1999) (S250, 106th Cong., 1st Sess.) (*hereinafter* 1999 hearings):

> A federal prosecutor shall not be subject to a state law or rule governing ethical conduct of attorneys, to the extent that the state law or rule is inconsistent with federal law or interferes with the effectuation of federal law or policy, including the investigation of violations of federal law.

[16] *Cf. Leis v. Flint*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the

the heads of the individual state courts that promulgate the respective ethical codes for lawyers in their jurisdictions and are ultimately responsible for ruling on questions of professional ethics, counseled against any change that would allow the Justice Department to exempt itself from the ethical rules which govern all other lawyers.[17] The National Organization of Bar Counsel, which represents the heads of the agencies in the 50 states and the District of Columbia charged by their respective high courts to investigate and prosecute attorneys for professional misconduct, also opposed any attempt to undercut the authority of the states to enforce their disciplinary codes with respect to federal prosecutors.[18] The legislation was never voted on and the CPA remains in force. However, the panel opinion in *Stern* interpreted the CPA as if it contained the preemption feature that the opponents of the law unsuccessfully tried to insert.

Congress had a model it could have used if it wanted to incorporate all of each state's respective ethics rules except those that conflicted in some way with federal practice. The Assimilated Crimes Act[19] is worded in a form just as general as the CPA, and has been part of federal law since 1825. It does not name any particular state nor identify any specific state statute, but it incorporates by reference all of the penal laws of each of the states and makes them applicable to federal

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standards of professional conduct. They also are responsible for the discipline of lawyers.")

[17] *See* 1999 hearings, *supra* n. 15 at 82-83 (1999) (letter from Ernest, A. Finney, Jr., on behalf of Conference of Chief Justices). The Conference of Chief Justices took the same position at the 1996 hearings on the CPA. *See* 1996 Hearings, *supra* n. 10 at 64-66 (Resolution XII of the Conf. of Chief Justices on the Proposed Rule Relating to Comms. with Represented Persons) (rejecting the DOJ's claim to exclusive authority to regulate the conduct of federal government attorneys)

[18] *See* 1999 hearings, *supra* n. 15 at 103 (1999) (letter from Michael J. Oths, President, National Organization of Bar Counsel)

[19] 18 U.S.C. § 13(a) ("Whoever within or upon any [federal enclave], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to like punishment.")

reservations within their borders. The language of the Assimilative Crimes Act does differ from the CPA in one significant way, however. It contains an express provision excepting the incorporation of those state statutes which deal with a subject otherwise regulated by federal law. The CPA lacks such a feature. The reason that it does so is not the result of some oversight by Congress. Given the state of the law as it existed prior to the adoption of the CPA, Congress would have engaged in an empty exercise lacking practical meaning to have included a provision that exempted federal prosecutors from preexisting state ethical rules that conflicted in any way with federal law.

In enacting the CPA, Congress clearly meant to require federal prosecutors to conform their behavior to state and local district court ethical rules even in situations where those rules present some degree of conflict with preexisting federal law. Since the Justice Department always took the position that its lawyers were bound by state ethical rules which did not conflict with federal procedure and policy,[20] there would have been no need for Congress to have enacted the CPA if it did not also require obedience to ethical rules that conflict in some way with other obligations governing Justice Department lawyers under federal law.

In fact, when Congress enacted the CPA it was well aware of the effect the CPA would have on the need for Justice Department lawyers to obey Rule 3.8(f), precisely the rule at issue in this case. In the 1996 hearings on the CPA, a representative of the Department argued against the CPA

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[20] *See* Proposed Regulation Governing Communications With Represented Persons, 59 Fed. Reg. 10,086 (March 3, 1994) ("federal attorneys generally continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices"); Richard L. Thornburgh, "Memorandum from Attorney General to all Justice Department Litigators" (June 9, 1989) *reprinted in In the Matter of John Doe, Esquire*, 801 F. Supp. 478, 490 (D. N. M. 1992) ("the states have the authority to regulate the ethical conduct of attorneys admitted to practice before their courts [citation omitted], that authority permits regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities")

specifically because its passage would leave federal prosecutors vulnerable to state ethics rules requiring them to obtain judicial approval before obtaining subpoenas for evidence from attorneys.[21] Before the effective date of the CPA, opponents in the Senate specifically referred to Rule 3.8(f) as a reason why a preemption provision should be enacted to enable federal prosecutors to avoid its ethical precept. Senator Abraham noted that:

> Colorado, New Hampshire, Pennsylvania, and Tennessee have 'ethics' rules requiring prior judicial approval of subpoenas of attorneys, even though federal case law has . . . adopted no such requirement. . . . [By passing the Citizens' Protection Act] we have established as a matter of federal law that . . . rules like this will indeed govern federal prosecutors' conduct. . .[22]

This case presents an opportunity for the Court to clarify the meaning of the CPA and settle the important question of the extent to which federal prosecutors are bound by state and local district court rules of ethics. The panel opinion was clearly wrong in concluding that the CPA requires federal lawyers to obey only those ethical rules that the Justice Department was already committed to obeying and allows federal lawyers to opt out of one of the precise ethical rules that was the subject of the Congressional debate.

The resolution of this case raises issues that go beyond the legitimacy of Rule 3.8(f), since in principle the reasoning of the *Stern* panel opinion would allow Justice Department lawyers to opt out of any ethical rule they contended posed a conflict with their responsibilities under federal law. This prospect is a matter of concern not only to Congress but to federal district

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[21] *See* 1996 hearings *supra* n. 10 at 12 (testimony of Seth Waxman, Associate Deputy Attorney General).

[22] 144 Cong. Rec. S 12966 (Nov. 12, 1998). *Cf.* Remarks of Sen. Hatch, Conference Report, Omnibus Consolidated and Emergency Supplemental Appropriations For Fiscal Year 1999, 144 Cong. Rec. S 12799 (Oct. 21, 1998) (noting effect of Act on grand jury practice).

judges as well. By invalidating Rule 3.8(f), the *Stern* panel "fails to give due deference to district courts in regulating matters peculiarly within their daily experience," *Stern*, 214 F.3d at 22 (Torruella, CJ dissenting from the denial of the petitions for rehearing en banc). (App. *infra* at 30a).

III. The Panel Opinion's Rejection of the Interpretation of the Rule by the District Court Represents an Unprecedented Approach to the Interpretation of a Local District Court Rule

The panel opinion represents a stark departure from the way that every other federal court has approached the question of how to interpret a district court rule. The panel rejected a construction of the rule by the district court that would have preserved its validity. Instead, the panel substituted its own interpretation that, in the panel's view, put the rule in a fatal conflict with other precepts of federal law. This approach is precisely the opposite of what good practice dictates.

A different First Circuit opinion, *Jaroma v. Massey*, 873 F.2d 17 (1st Cir. 1989), is instructive of the effort the panel should have made to interpret the rule to avoid conflicts with controlling law. *Jaroma* recognized that:

> [l]ocal district court rules cannot be construed in such a way as to render them inconsistent with applicable provisions of [governing federal law]. *Our task, then, is to interpret [the local rule] so as to preserve its scope and validity* without running afoul of the requirements of [governing federal law]." 873 F.2d at 20. (emphasis added)

Jaroma's statement of the guiding principle is a reflection of the way that other courts have approached the same task. *See e.g., Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995) ("We are, however, under an obligation to construe local rules so that they do not conflict with the federal rules, and we have exercised our ingenuity in doing so."); *United States v. White*, 980 F.2d 836, 844 (2nd Cir. 1992) ("[A] construction of a

local rule that creates a conflict with a federal rule should be avoided.")

It is unprecedented for a court of appeals to reject a district court's interpretation of its own rule and substitute another when the result would be to create a irreconcilable conflict where one would not otherwise exist. Counsel has been unable to find any other opinion in which a facial challenge to a local rule has been upheld by rejecting an interpretation that would have saved the rule. In every other case dealing with a facial challenge, where a court of appeals has rejected a district court's interpretation of its own rule, it has been the latter which created a conflict with governing federal law, not the former. *See e.g., John v. Louisiana*, 757 F.2d 698 (5th Cir. 1985). The panel's methodology in interpreting Rule 3.8(f) has "turned the proper inquiry on its head -- evaluating the Rule as if [it is] presumptively invalid. This presumption is wholly unsupported." *Whitehouse*, 53 F.3d at 1362.

The panel opinion's skepticism about applying the principle that courts should resist interpreting local rules in a way that puts them in conflict with national rules, *see Stern*, 214 F.3d at 15 (App. *infra* 16a), not only ignores the approach that every other court has taken, but fails to accord the district court the respect it is due. District courts are normally given deference in the interpretation of their own rules. *See John*, 757 F.2d at 707; 12 Wright, Miller & Marcus, FED'L PRAC. & PRO., § 3153, at 533 (2d ed. 1997). In addition, the First Circuit itself, in *Whitehouse*, noted that the view of district court judges in crafting a solution to the problem of attorney subpoenas deserves considerable weight. *Whitehouse*, 53 F.3d at 1361-62. The panel's approach is particularly inapt in light of the First Circuit's earlier opinion in *Klubock II*, 832 F.2d at 667 which dealt with an earlier version of Rule 3.8(f), and "encourage[d] the district court to monitor closely the working of [the rule], and to be receptive to experience-based proposals for improvement." By rejecting the district court's interpretation of the rule, the panel decision has frustrated the effort of the district court judges to do exactly what the First Circuit invited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 2000

Donald K. STERN, Plaintiff, Appellant,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, et al.,
Defendants, Appellees.

No. 99-1839.

United States Court of Appeals

First Circuit

Heard Jan. 5, 2000
Decided April 12, 2000

Order Denying Rehearing and Suggestion for Rehearing En Banc June 22, 2000

213 F.3d 4 (1st Cir. 2000)

[*7] Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and BOUDIN, Circuit Judge.

SELYA, Circuit Judge.

This appeal tests the limits of a federal district court's authority to promulgate local rules. The court below upheld a rule constraining the issuance of subpoenas seeking client-related information from lawyers in criminal cases. Because we find that the rule falls outside the permissible scope of local rulemaking authority, we reverse.

I. BACKGROUND

Before assaying a preliminary question of justiciability and addressing the controversy's merits, we trace the origins of the challenged rule and chart the travel of the case.

A. The Evolution of Local Rule 3.8(f).

The 1980s witnessed a dramatic increase in the number of subpoenas served on defense attorneys by federal prosecutors. The reasons for this trend are difficult to pinpoint, but some commentators have linked it with heightened efforts to fight organized crime and drug-trafficking, new forfeiture laws, and an unprecedented expansion of the Department of Justice (DOJ). *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 3.8:701, at 700 (Supp.1996); Frank O. Bowman, III, *A Bludgeon by Any Other Name*, 9 Geo. J. Legal Ethics 665, 686 n. 74 (1996). In 1985, mindful that forcing a lawyer to offer evidence against her client may sow seeds of mistrust and increase [*8] the incidence of conflicted interests, the DOJ introduced guidelines for the issuance of attorney subpoenas, including an internal preapproval process. *See United States v. Perry*, 857 F.2d 1346, 1347-48 (9th Cir.1988) (citing *United States Attorneys' Manual* § 9-2.161(a) (July 18, 1985)). Responding to the prodding of bar leaders, the Massachusetts Supreme Judicial Court (the SJC) also took prophylactic action. It adopted an ethics rule, known as Prosecutorial Function 15 (PF 15), which stated that:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.
>
> S.J.C. R. 3:07, PF 15 (effective Jan. 1, 1986).

The United States District Court for the District of Massachusetts thereafter incorporated PF 15 into its local rules. PF 15 withstood the United States Attorney's ensuing challenge by the narrowest of margins. *See United States v. Klubock*, 639 F.Supp. 117 (D.Mass.1986), *aff'd*, 832 F.2d 664

(1st Cir.1987) (equally divided en banc). Crucial to the district court's holding was the fact that PF 15 imposed no substantive limitations on the right to issue subpoenas. *See id.* at 120 & n. 7, 124.

For the next twelve years, PF 15 held sway in the District of Massachusetts. In the interim, the Rhode Island Supreme Court adopted a rule of conduct requiring prosecutors to obtain judicial approval prior to issuing attorney subpoenas. *See* R.I. Sup.Ct. Rules, Art. V., R. Prof'l Conduct 3.8 & cmt. (adopted Nov. 1, 1988). This rule closely resembled PF 15, with two significant deviations: its reach extended to subpoenas outside the grand jury context, and its text included a comment outlining substantive standards to be applied by a court in determining whether to sanction an attorney subpoena request. *See id.* Specifically, the comment suggested that judicial approbation should be withheld unless, inter alia, the information sought was (a) not privileged, (b) "essential" to the government's investigation, and (c) unobtainable from any "other feasible alternative." *Id.* When the United States District Court for the District of Rhode Island incorporated the state standard into its local rules on April 20, 1989, the United States Attorney for that district challenged it. In *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir.1995), a panel of this court upheld the local rule, albeit strongly suggesting that a different result would obtain were the criteria limned in the comment embedded in the text of the rule itself (and, thus, made mandatory rather than precatory). *See id.* at 1357-58 & n. 12.

We temporarily shift our focus to the national stage. In 1990, the American Bar Association (the ABA) amended Rule 3.8 of the Model Rules of Professional Conduct by adding a new paragraph (f) and comment:

> The prosecutor in a criminal case shall:
>
> . . . . .

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; [and]

(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Comment

[*9] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The prosecutor is required to obtain court approval for the issuance of the subpoena after an opportunity for an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are met.

ABA Standing Comm. on Ethics and Prof'l Responsibility and Section of Criminal Justice, Report 118, at 1 (Feb.1990). After the Third Circuit struck down a bar rule patterned on Model Rule 3.8(f), *see Baylson v. Disciplinary Bd.*, 975 F.2d 102 (3d Cir.1992), the ABA retreated; it removed the judicial preapproval requirement by deleting both subparagraph (2) and the second sentence of the comment. See ABA Standing Comm. on Ethics and Prof'l Responsibility, Report 101, at 1 (Aug.1995).

On June 9, 1997, the SJC amended the Massachusetts Code of Professional Conduct to replace PF 15 with the (discarded) 1990 version of Model Rule 3.8(f), omitting the second sentence of the comment, but including the rescinded

subparagraph (2). See S.J.C. R. 3:07, Rule 3.8(f) & cmt. 4. The result was to alter PF 15 in three important respects: extending it to trial as well as grand jury subpoenas; providing for an "adversarial proceeding" in advance of the issuance of an attorney subpoena; and promulgating three substantive standards for judicial preapproval.

B. The Instant Litigation.

By local rule, attorneys practicing in the United States District Court for the District of Massachusetts must adhere to the ethical rules adopted by the SJC, unless a specific exception obtains. *See* D. Mass. R. 83.6(4)(B). On November 17, 1997, the United States Attorney for the District of Massachusetts, Donald K. Stern, wrote to the chief judge of the district court, urging that such an exception be made for State Rule 3.8(f). By letter dated December 3, 1997, the court declined to craft a specific exception, indicating that Stern's concerns would be resolved on a case-by-case basis. On January 1, 1998, Rule 3.8(f) went into effect. At that point, Stern directed his staff to hold in abeyance any applications to the district court for attorney subpoenas.

Stern and Craig C. Donsanto (a senior DOJ lawyer based in Washington and a member of the Massachusetts bar), both acting in their official capacities, filed suit in the district court on May 13, 1998. They sought to have both State Rule 3.8(f) and Local Rule 3.8(f) declared invalid as applied to members of the Massachusetts bar practicing before federal courts. The complaint alleged in substance that Rule 3.8(f), in both its federal and state incarnations, exceeded the district court's rulemaking authority, contradicted the federal common law anent grand jury practice, conflicted with the federal rules of criminal procedure and evidence, and violated the Supremacy Clause of the United States Constitution.

Initially, the named defendants were the SJC, the Massachusetts Board of Bar Overseers (the Board), Bar

Counsel, and the United States District Court itself.[1] The complaint was later amended to add as defendants the individual judges of the district court (hereinafter, along with the court itself, the Judicial Defendants).

The contours of the case were narrowed when Bar Counsel filed an affidavit in which he vouchsafed that he would not wield State Rule 3.8(f) against federal prosecutors, but, rather, would refer any alleged violations to the federal district court for discipline under Local Rule 3.8(f). [*10] This concession rendered the Supremacy Clause issue moot and led the plaintiffs to dismiss their claims against the SJC and the Board. Rosenfeld then agreed not to attempt to enforce Local Rule 3.8(f) against members of the Massachusetts bar practicing outside the commonwealth, and Donsanto dropped out of the picture.

Stern had moved at the outset for preliminary injunctive relief. All the defendants opposed this motion, and the Judicial Defendants filed a motion to dismiss the complaint as unripe. The district court heard argument on October 7, 1998, and took both motions under advisement. While the court was pondering the matter, the President signed into law a bill, now codified at 28 U.S.C. § 530B, that made certain state standards directly applicable to federal prosecutors. The parties debated the relevance and effect of this provision in a series of subsequent submissions.

The district court ultimately determined the issues presented to be ripe for review and rejected the claim that section 530B rendered the controversy moot. *See Stern v. SJC*, 184 F.R.D. 10, 13-14 & n. 5 (D.Mass.1999). Then, reading subparagraphs (1) and (2) independently, the court found *Whitehouse* controlling in part and upheld both the prior judicial approval requirement and the provision for an

[1] The SJC administers professional responsibility matters through the Board. In turn, Bar Counsel, currently Daniel C. Crane, serves as the Board's chief enforcement officer. *See* S.J.C. R. 4:01.

adversarial hearing. See id. at 17-19. Finally, the court approved the substantive requirements of subparagraph (1) as ethical precepts not inconsistent with federal law. See id. at 19. Following the entry of a final judgment, Stern launched this appeal.

II. RIPENESS

We consider de novo the Judicial Defendants' contention that the controversy is not ripe for adjudication. *See Riva v. Massachusetts*, 61 F.3d 1003, 1007 (1st Cir.1995).

The ripeness doctrine has both constitutional and prudential dimensions. *See Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 242-44, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *Rhode Island Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 33 (1st Cir.1999). Its basic rationale is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Courts must apply a two-part test to assess ripeness. *See id.* at 149, 87 S.Ct. 1507. First, it is necessary to determine whether the issue presented is fit for judicial review--an inquiry that "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed." *Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530, 535 (1st Cir.1995). Second, it is necessary to evaluate the extent to which withholding judgment will impose hardship--an inquiry that typically "turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties." *W.R. Grace & Co. v. EPA*, 959 F.2d 360, 364 (1st Cir.1992) (quoting *Abbott Labs.*, 387 U.S. at 152, 87 S.Ct. 1507). Both prongs of the test ordinarily must be satisfied, although a very strong showing on one axis may compensate for a relatively weak showing on the other. *See Ernst & Young*, 45 F.3d at 535.

This case, which questions whether the federal district court has the power to incorporate State Rule 3.8(f) into the armamentarium of its local rules, passes the first prong of the test. The issue presented can be finally resolved by declaratory judgment, its contours are sharply defined, and additional facts will not affect its resolution. The conclusion that the issue is fit for review is bolstered, moreover, by a realization that deciding the question appears unavoidable: Local Rule 3.8(f) imposes new substantive and procedural requirements on prosecutors who request attorney subpoenas, and Bar Counsel has stated unequivocally that he will enforce those requirements. Since bring- [*11] ing this suit, the United States Attorney has delayed requests for no fewer than twenty-six such subpoenas, and it seems reasonable to suppose that in some of these instances the prosecutors would have had difficulty in satisfying the "essentiality" and/or "no feasible alternative" criteria. Short of a continuation of Stern's self-imposed moratorium--and the public has a right to expect that such a state of affairs will not last indefinitely--a test of Local Rule 3.8(f)'s facial validity appears inevitable.

This case also satisfies the hardship prong. Delaying adjudication until a more concrete controversy emerges (until, say, a particular attorney subpoena request reaches the judicial preapproval stage or disciplinary proceedings are instituted in the aftermath of a served subpoena) would inflict significant institutional costs with little corresponding gain. Indeed, charting such a course would put Stern on the horns of a dilemma, forcing him to decide whether to serve attorney subpoenas in cases arguably prohibited by the local rule and thus risk potential sanctions or to refrain from so doing and thus jeopardize the success of ongoing criminal investigations. It is precisely this sort of " 'direct and immediate' dilemma," *W.R. Grace*, 959 F.2d at 364 (quoting *Abbott Labs.*, 387 U.S. at 152, 87 S.Ct. 1507), that Congress wished to ameliorate when it passed the Declaratory Judgment Act. *See ANR Pipeline Co. v. Corporation Comm'n*, 860 F.2d 1571, 1578 (10th Cir.1988) ("Once the gun has been cocked and aimed

and the finger is on the trigger, it is not necessary to wait until the bullet strikes to invoke the Declaratory Judgment Act.").

A determination that this case is ripe for adjudication squares with the way in which we, and other courts of appeals, have treated analogous cases (albeit without explicit discussion of ripeness). In Klubock, this court fielded a preemptive strike by federal prosecutors against a newly adopted ethics rule. In Whitehouse, we entertained a similar foray, explaining that "the proper method for mounting a facial challenge to the validity of [a local rule] ... is through an action for declaratory and/or injunctive relief filed in the district court." 53 F.3d at 1353. Moreover, two other courts of appeals have adjudicated pre-enforcement challenges to ethics rules in parallel circumstances. *See United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir.1999) (*CSC II*); *Baylson*, 975 F.2d 102.

Another case that sheds light on the question of ripeness is *United States v. Colorado Supreme Court*, 87 F.3d 1161 (10th Cir.1996) (*CSC I*). There, the Tenth Circuit held that the United States had standing to mount a pre- enforcement challenge to a local rule identical to Local Rule 3.8(f), crediting the government's stated trepidation that the rule would interfere with federal subpoena practice. *See id.* at 1165-67. Although the *CSC I* court did not discuss ripeness per se, standing and ripeness often overlap. *See Rhode Island Ass'n of Realtors*, 199 F.3d at 33. So here: we think that the court's finding of standing necessarily implied that the controversy was ripe for adjudication.

In a pre-enforcement challenge to a law carrying significant penalties, standing exists when the plaintiff has manifested an intention to engage in conduct arguably proscribed by the statute, and there exists a "credible threat" of enforcement. *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir.1996). In most situations, as here, that self-same credible threat serves to render the case fit for judicial review and to demonstrate the hardship that will

result should no review ensue. *See Rhode Island Ass'n of Realtors*, 199 F.3d at 33 (stating that a "concrete plan[ ] to engage immediately (or nearly so) in an arguably proscribed activity ... gives a precise shape to disobedience, posing a specific legal question fit for judicial review," and "[a] showing that the challenged statute, fairly read, thwarts implementation of the plan adds the element of hardship").

[*12] The Judicial Defendants' vigorous arguments to the contrary are ultimately unpersuasive. Citing *Ernst & Young*, they asseverate that Stern's claims are too contingent and uncertain to be fit for review. But the examples they give include events that are almost certain to materialize (*e.g.*, internal DOJ approval of an application for a subpoena addressed to an attorney), and events that are completely irrelevant (*e.g.*, destruction of evidence by a targeted attorney). Stern stands poised to request and serve attorney subpoenas, but reasonably fears disciplinary proceedings (for himself and his staff) if he does so. Thus, the only contingency likely to deter the parties from a collision course is continued self-restraint on the part of Stern's office. This is a far cry from *Ernst & Young*, where the relevant injury would materialize, if at all, only after a long chain of remote and speculative events, many of which involved third parties.[2] *See* 45 F.3d at 538.

Next, the Judicial Defendants note that the "linchpin of ripeness ... is adverseness." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir.1994). Building on this foundation, they complain that the current controversy lacks adverseness because the lawyers potentially subject to subpoena (and their clients, for that matter) are unrepresented. This rather simplistic formulation overlooks, however, that as a general rule a "conflict between state officials empowered to enforce a law and private parties subject to prosecution of that

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[2] *Massachusetts Ass'n of Afro-American Police v. Boston Police Department*, 973 F.2d 18 (1st Cir.1992) (per curiam), is similarly distinguishable. There, we found a pre-enforcement challenge unripe because the party with the power to inflict the feared injury had expressly disclaimed any intent to do so. *See id.* at 20-21.

law is a classic 'case' or 'controversy' within the meaning of Art. III." *Diamond v. Charles*, 476 U.S. 54, 64, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). The defendants here are empowered to enforce the strictures of Local Rule 3.8(f) through disciplinary proceedings against Stern and his subalterns. This type of controversy is thus sufficiently adverse even though the class of persons that the law was designed to protect is not separately represented. After all, that class "lacks a judicially cognizable interest in the prosecution or nonprosecution" of Stern or the other attorneys in his office. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). Consequently, the fact that the district court adopted Local Rule 3.8(f) out of a desire to shield the attorney- client relationship does not mean that particular attorneys and clients must be joined in a facial attack on the rule.

Finally, the Judicial Defendants suggest that the DOJ guidelines render this case unripe. Because the standards contained in the guidelines and those contained in Local Rule 3.8(f) overlap, this thesis goes, there is scant likelihood that Local Rule 3.8(f) will work any harm. This thesis has a plausible ring but, in the last analysis, it fails to cover the ground. We explain briefly.

There is no question that the DOJ guidelines' "reasonably needed" criterion, 3 *Department of Justice Manual* § 9-13.410, at 9-165 (2d ed.2000), is markedly less demanding than the "essentiality" requirement contained in Local Rule 3.8(f). We think that the DOJ criteria are also less demanding than the "no feasible alternative" requirement; the guidelines stipulate that "all reasonable attempts shall be made to obtain the information from alternative sources ... *unless such efforts would compromise the investigation or case*," id. (emphasis supplied), whereas the "no feasible alternative" provision contains no similar loophole. In all events, the guidelines are subject to change at the whim of the DOJ. Last (but not least), an internal review mechanism that specifically disavows any intent to create legally enforceable rights obviously does not burden prosecutors in the same way, or to the [*13] same

extent, as does a binding rule of court that imposes substantive standards, requires prior judicial approval, and subjects government attorneys to potential disciplinary action. *Cf. Whitehouse*, 53 F.3d at 1362 n. 18 (suggesting that DOJ guidelines did not render a prior judicial approval requirement superfluous). For these reasons, we reject the notion that the mere existence of the DOJ guidelines dissipates any hardship.

We have said enough on this score. The threat of ethics enforcement is genuine, compliance costs are real and immediate, and the chilling effect on attorney subpoena requests constitutes an injury sufficient to support a justiciable controversy. *See CSC I*, 87 F.3d at 1165-67. Thus, the issue presented here--the authority of the federal district court to incorporate State Rule 3.8(f) into its local rules--is ripe for review.

III. THE MERITS

The authority of the federal district courts to adopt local rules emanates from three sources. First, Congress has empowered the Supreme Court to prescribe rules of practice and procedure for the federal courts. *See* 28 U.S.C. § 2072(a). In turn, the Supreme Court has authorized district courts to craft local rules to implement, or fill gaps in, national rules of practice and procedure. *See* Fed.R.Crim.P. 57(a)(1); Fed.R.Civ.P. 83(a)(1). Second, Congress has vested the lower federal courts with independent authority to prescribe local rules. See 28 U.S.C. § 2071(a). Third, district courts have inherent power arising from the nature of the judicial process, and this power extends to certain types of rulemaking. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Whitehouse*, 53 F.3d at 1355.

Regardless of the source, local rulemaking authority is bounded. A local rule must be both constitutional and rational, and its subject matter must be within the ambit of the court's regulatory power. *See Frazier v. Heebe*, 482 U.S. 641, 646, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987); *Whitehouse*, 53 F.3d at 1355-56. In this same vein, a local rule must be consistent

with, but not duplicative of, Acts of Congress and nationally applicable rules of practice, procedure, and evidence. *See* 28 U.S.C. § 2071(a); Fed.R.Crim.P. 57(a)(1); Fed.R.Civ.P. 83(a)(1). Even if a local rule does not contravene the text of a national rule, the former cannot survive if it subverts the latter's purpose. *See Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 144 (1st Cir.1976). Then, too, local rules should cover only interstitial matters. See Fed.R.Crim.P. 57 advisory committee's note; *see also United States v. Horn*, 29 F.3d 754, 760 (1st Cir.1994) (noting that a court's inherent power has definite limits). They may not create or affect substantive rights, *see* 28 U.S.C. § 2072(b), or institute "basic procedural innovations," *Miner v. Atlass*, 363 U.S. 641, 650, 80 S.Ct. 1300, 4 L.Ed.2d 1462 (1960).

The core issue presented by this appeal is whether the district court had the power to adopt Local Rule 3.8(f). This question of law engenders de novo review. Before answering this query, however, we pause to measure its dimensions.

A. How to Construe Local Rule 3.8(f).

At Bar Counsel's urging, the court below read subparagraphs (1) and (2) of Local Rule 3.8(f) independently. *See Stern*, 184 F.R.D. at 16-17. On this bifurcated reading, the substantive standards delineated in subparagraph (1) would be relevant only to potential disciplinary proceedings, and a court deciding whether to approve a subpoena request pursuant to subparagraph (2) would have no obligation to apply them. We reject this artificial construction of Local Rule 3.8(f).

The most sensible way to construe Local Rule 3.8(f) is as a unified whole. Each subparagraph is a mere sentence fragment and neither makes sense without reference to the shared introductory lan- [*14] guage. Court rules, like statutes and ordinances, generally are to be read in a holistic manner. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991); *Massachusetts Ass'n of HMOs v. Ruthardt*, 194 F.3d 176, 180 (1st Cir.1999); *O'Connell v.*

Shalala, 79 F.3d 170, 176 (1st Cir.1996). This tenet applies with special force when subdivisions are grammatically interrelated. *See American Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1058 (2d Cir.1974).

Here, the case for reading the rule as a whole is even stronger, for the connection between the two halves is not only grammatical but also logical. Subparagraph (2) outlines a process for determining whether a subpoena application should be approved, but gives no clue as to what standard a judge is to apply in making that determination. The obvious place to look is subparagraph (1), which sets forth such a standard. Indeed, the court below acknowledged that "as a practical matter, a court faced with a request for an attorney-subpoena is likely to engage in a similar inquiry in the course of determining whether issuance of the subpoena is appropriate." *Stern*, 184 F.R.D. at 16 n. 12. The presence of the attorney to be subpoenaed--a feature not involved in the scheme upheld in *Whitehouse*--virtually guarantees such an inquiry.

On the other hand, subparagraph (2) would serve no purpose if courts evaluated subpoena applications solely on the basis of traditional motion-to- quash standards. For the adversarial hearing to be meaningful, the targeted attorney would have to be told in advance of the content of the testimony or materials sought. This notice, no less than service of the subpoena itself, would drive a wedge of distrust between lawyer and client. Thus, subparagraph (2), on the bifurcated reading, would mirror existing quashal procedure and generate no ethics benefits whatsoever.

The sockdolager is that the original drafters certainly intended that the two subparagraphs of the rule be harmonized, not balkanized. As discussed above, the text of Local Rule 3.8(f) derives from (and is identical to) a former ABA Model Rule. The comment to that rule made it transparently clear that the judicial preapproval described in subparagraph (2) was designed to ensure compliance with the substantive standards described in subparagraph (1). Absent some specific

disclaimer (not present here), the district court cannot adopt verbatim the text of a model rule without accepting the drafters' unequivocal interpretation of its meaning. *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source ... it brings the old soil with it.").

To be sure, when the SJC formulated State Rule 3.8(f), it omitted the second sentence of the comment to the former ABA rule (which made the connection between the two subparagraphs explicit). *But see Whitehouse*, 53 F.3d at 1358 nn. 12 & 14, 1364-65 (noting that comments and commentary are not binding). In addition, the Massachusetts version lists as the sources for subparagraph (2) both former ABA Model Rule 3.8(f)(2) and PF 15, and the latter rule has been interpreted to impose no substantive restrictions beyond the prototypical motion-to-quash standards. *See Klubock*, 639 F.Supp. at 120 & n. 7, 124. But these reeds are far too slender to shore up a construction that splits grammatically interrelated provisions, imports a standard of review from outside the ethics code, and directly contradicts the drafters' manifest intention.

Bar Counsel also argues that we should defer to his construction because he is the official charged with enforcement of ethics rules in Massachusetts. With respect, we doubt that Bar Counsel's litigation position is entitled to any deference. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (holding that an agency's litigating position is not entitled to deference); *Massachusetts v. Blackstone Valley Elec. Co.*, 67 [*15] F.3d 981, 991 (1st Cir.1995) (same). In all events, Bar Counsel's construction does not bind the judges of the District of Massachusetts who, as defendants here, have pointedly refused to endorse it.[3] Finally, any deference that might normally be

[3] Consistent with their position that the controversy is not ripe, the Judicial Defendants apparently deem it incumbent upon them to refrain from rendering what might be seen as an advisory opinion.

due is overcome here by the availability of a much more logical reading and a clear statement of the drafters' intent. *Cf.* 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 3153, at 533 (2d ed.1997) (explaining that even "a district court's construction of its own rule will be reversed if the appellate court is convinced that the district court has misconstrued its own rule").

Bar Counsel next invokes the principle that courts should resist interpreting a statute in a way that provokes a constitutional problem. *See United States v. Gifford*, 17 F.3d 462, 473 (1st Cir.1994). Other courts of appeals have extended this principle to the construction of local rules, thereby seeking to avoid interpretations that place local rules on a collision course with national rules. *See, e.g., Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir.1995); *United States v. White*, 980 F.2d 836, 844 (2d Cir.1992); *cf. Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir.1989) (per curiam) (explaining that ambiguous "[l]ocal district court rules cannot be construed in such a way as to render them inconsistent with applicable provisions of the Federal Rules of Civil Procedure").

There are reasons to question whether such an extension of the principle is appropriate; after all, striking down a local rule, unlike declaring a statute unconstitutional, does not implicate separation of powers or countermajoritarian concerns. But even assuming, for argument's sake, the validity of the extended principle--on the ground, say, that the local rule here derives from a state rule, and that the issue therefore has overtones of comity--it does not control the outcome in this instance. Interpretive ingenuity has its limits. The idea that judges charged with interpreting a rule should strive to do so in a way that will avoid conflicts with governing law is a useful device in doubtful cases, but it does not permit the interpreters to substitute their judgment for that of the drafters or to rewrite the rule from scratch. Here, there is both a natural, holistic reading of the local rule and a clear statement by the drafters in support of such a reading. In these circumstances, we will not

embrace an implausible construction simply to minimize the potential for conflict with federal law.

For these reasons, we hold that Local Rule 3.8(f) must be read as an indivisible whole. Consequently, judicial preapproval under subparagraph (2) of the rule proceeds, if at all, on the basis of the substantive standards elucidated in subparagraph (1).

B. Rule 3.8(f) as Applied to Grand Jury Subpoenas.

Because local rulemaking authority is at a lower ebb in the grand jury context, we ease first into those relatively shallow waters.

The grand jury is deeply rooted in Anglo-American tradition and is "a constitutional fixture in its own right." *United States v. Williams*, 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (internal quotation marks omitted). It is not a part of either the Executive or Judicial Branch, but, rather, "a kind of buffer ... between the Government and the people." *Id.* Accordingly, "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Id.* at 50, 112 S.Ct. 1735. A local rule may not "substantially [*16] alter [ ] the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Id.* Nor may a local rule trench upon any core attribute of the grand jury, including: "1) its independence from the court's supervision; 2) its broad investigative powers; 3) the presumption of validity accorded its subpoenas; 4) the secrecy of its proceedings; [or] 5) its general freedom from procedural detours and delays." *Whitehouse*, 53 F.3d at 1357. It is against this backdrop that we take the measure of Local Rule 3.8(f) as it pertains to grand jury subpoenas.

We do not write on a pristine page. As the defendants repeatedly remind us, *Whitehouse* held that a local rule

requiring judicial preapproval for the service of an attorney subpoena neither undermined the historic role of the grand jury nor interfered with its essential attributes. *See id.* at 1357-62. But this holding rested squarely on the panel's determination that the particular local rule worked no substantive change in the governing law because judicial preapproval would be granted or denied under traditional motion-to-quash standards. *See id.* at 1357-58 & nn. 12-13 (explaining that the rule "merely authorizes district courts to reject a prosecutor's attorney- subpoena application for the traditional reasons justifying the quashing of a subpoena"); *see also* Fed.R.Crim.P. 17(c) (authorizing courts to quash a subpoena "if compliance would be unreasonable or oppressive"). In so holding, the *Whitehouse* court brushed aside the seemingly more rigorous criteria delineated in the comment to the rule, on the ground that the comment was merely advisory. *See* 53 F.3d at 1358 n. 12. So viewed, the rule imposed no additional burden on grand jury independence because courts, in theory, would apply the motion-to-quash standards that govern under Rule 17, not the comment's suggested criteria, in determining whether to approve an attorney subpoena request.[4]

The Rhode Island rule's saving grace is absent here. Local Rule 3.8(f) differs significantly in that it imposes new substantive requirements for judicial preapproval of grand jury subpoenas. In so doing, the rule alters the grand jury's historic role, places it under overly intrusive court supervision, curbs its broad investigative powers, reverses the presumption of validity

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[4] To be sure, the panel also suggested that the preapproval process did not impede grand jury independence because it did not apply to subpoenas sought by the grand jury acting independently from the prosecutor. *See Whitehouse*, 53 F.3d at 1357. While we are bound by the holding of *Whitehouse*, we eschew this component of its reasoning. As a practical matter, grand jury subpoenas are almost universally issued by and through federal prosecutors. *See, e.g., In re Grand Jury Matters (United States)*, 751 F.2d 13, 16 (1st Cir.1984). Moreover, the Supreme Court has explicitly rejected the notion that an otherwise impermissible rule of grand jury procedure becomes permissible if it is enforced against the prosecutor instead of the grand jury itself. *See Williams*, 504 U.S. at 53, 112 S.Ct. 1735.

accorded to its subpoenas, undermines the secrecy of its proceedings, and creates procedural detours and delays. It therefore impermissibly interferes with grand jury proceedings. *See* 1 Hazard & Hodes, supra, § 3.8:701, at 702 (Supp.1997) ("Rule 3.8(f) in its original form seemed clearly invalid ... as applied to ... federal grand jury subpoenas to criminal defense lawyers.").

Because any one of these vices would suffice to invalidate the rule as applied to grand jury subpoenas, we confine our discussion to two of the most glaring defects: Local Rule 3.8(f)'s impact on grand jury secrecy and its potential as an incubator for delay. In *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991), the Court held that the government could not be required to demonstrate that the materials sought by a grand jury subpoena were relevant. *See id.* at 298-99, 111 S.Ct. 722. The Court explained that such a requirement " 'would saddle a grand jury with minitrials [*17] and preliminary showings,' " *id.* (quoting *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973)), and would "threaten[ ] to compromise 'the indispensable secrecy of grand jury proceedings,' " *id.* at 299, 111 S.Ct. 722 (quoting *United States v. Johnson*, 319 U.S. 503, 513, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943)); *see also* Fed.R.Crim.P. 6(e) (cloaking grand jury proceedings in secrecy). Requiring a prosecutor to show that subpoenaed evidence is essential and not otherwise feasibly obtainable would have the same two impermissible effects. Consequently, we hold that Local Rule 3.8(f), as it pertains to grand jury subpoenas, encroaches unduly upon grand jury prerogatives and, therefore, is *ultra vires*.

C. Rule 3.8(f) as Applied Outside the Grand Jury Context.

Outside the grand jury context, Stern asseverates that Local Rule 3.8(f) is beyond the district court's competency because it goes past the "matters of detail" appropriate for local rulemaking, Fed.R.Crim.P. 57 advisory committee's note, and works a fundamental procedural change. This argument

depends heavily on *Miner v. Atlass*, in which the Court held that a local admiralty rule authorizing oral discovery depositions exceeded the district court's rulemaking authority. *See* 363 U.S. at 650, 80 S.Ct. 1300. The Court reasoned that this innovation, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine." *Id.* Accordingly, it was too basic to be effectuated through local rulemaking. *See id.*

In *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973), the Court elaborated on this concept, explaining that "[t]he 'basic procedural innovations' to which *Miner* referred are those aspects of the litigatory process which bear upon the ultimate outcome of the litigation." *Id.* at 163 n. 23, 93 S.Ct. 2448. Applying this taxonomy, the Court upheld a local rule providing for six-member civil juries in lieu of traditional twelve-member juries because the party challenging the rule had not shown any discernible difference in the results reached. *See id.* Synthesizing *Miner* and *Colgrove*, we conclude that the relevant inquiry is whether Local Rule 3.8(f), applied outside the grand jury context, is apt to affect the ultimate outcome of criminal proceedings. *See Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 569 (3d Cir.1985) (en banc).

The answer to this inquiry depends, in the first instance, on current practice under Fed.R.Crim.P. 17. Rule 17(c) authorizes subpoenas for the production of documentary evidence, objects, and the like. That rule prescribes a procedure and a standard for challenging such subpoenas: "The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." The Supreme Court elucidated the meaning of this standard in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), holding that a subpoena duces tecum is not "unreasonable or oppressive" if the proponent establishes relevancy, admissibility, and specificity. See id. at 700, 94 S.Ct. 3090.

Roughly the same standard applies to subpoenas compelling the attendance of witnesses, *i.e.*, subpoenas ad testificandum. Although Rule 17(a), which governs such subpoenas, does not provide explicitly for quashal or modification, courts routinely have entertained motions seeking such relief and decided them by reference to comparable principles. Specifically, a subpoena ad testificandum survives scrutiny if the party serving it can show that the testimony sought is both relevant and material. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982); *United States v. Campbell*, 874 F.2d 838, 850-51 (1st Cir.1989).

These traditional standards for quashal of trial subpoenas form the template for [*18] further inquiry here.[5] As we have said, Local Rule 3.8(f) requires a prosecutor, before serving an attorney subpoena, to demonstrate that the information sought is essential, not privileged, and not otherwise feasibly available. These are significant departures from prior practice, and they raise the bar for obtaining relevant and material evidence. Collectively, they work changes too fundamental to be accomplished under the aegis of the district courts' local rulemaking power.

In particular, the "essentiality" and "no feasible alternative" requirements are substantially more onerous (and, thus, more restrictive) than the traditional motion-to-quash standards. Essentiality is obviously a more demanding criterion than relevancy or materiality. By like token, Rule 17 jurisprudence contains no corollary to the principle that a subpoena issued to

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[5] It bears emphasis that the motion-to-quash standards applicable to trial subpoenas historically have not been applied to grand jury subpoenas. *See R. Enters.*, 498 U.S. at 298-99, 111 S.Ct. 722 (holding that recourse to the Nixon criteria would unduly interfere with grand jury proceedings); *In re Grand Jury Proceedings (Hill)*, 786 F.2d 3, 5 n. 2 (1st Cir.1986) (per curiam) (declining to require a showing of "need" or "relevance" before a court may enforce a grand jury subpoena directed to an attorney). Because grand jury subpoenas are sui generis, we use the term "trial subpoenas" as a shorthand for all other subpoenas (*e.g.*, subpoenas issued in the course of pretrial hearings).

one source cannot stand if the information sought is (or may be) available from some other source.

Two examples illustrate these points. Suppose, in a robbery case, that a defense lawyer received a lump-sum advance payment for services in the precise amount of the purloined funds from a client with no visible means of support. There is other evidence linking the client to the robbery, so the billing information could not fairly be described as "essential" to the prosecution. Hence, Local Rule 3.8(f) would prohibit the prosecutor from serving a subpoena on the defense attorney, notwithstanding the unarguable materiality and relevancy of the retainer information. Next, consider unprivileged documents in a lawyer's file relating to a complex, and possibly fraudulent, international real estate transaction. These documents may be obtainable without a subpoena duces tecum directed to the lawyer, but only through time-consuming, relatively expensive (but still feasible) alternative means. Local Rule 3.8(f) would prohibit an attorney subpoena, even though the situation easily satisfies standards of relevancy, admissibility, and specificity.

These examples are not eccentric hypotheticals, but, rather, fairly typical of the sort of situation in which a prosecutor might wish to serve an attorney subpoena (others easily can be conceived). We think that they demonstrate convincingly that Local Rule 3.8(f) imposes novel requirements that threaten to preclude the service of otherwise unimpeachable subpoenas and thus restrict the flow of relevant, material evidence to the factfinder. Considering that compelling the production of evidence is of "great importance" to litigants, *Miner*, 363 U.S. at 650, 80 S.Ct. 1300, this is a fairly drastic alteration of the rules--too basic to be effected through local rulemaking.[6] *See*

[6] In striking down a local rule in *Miner*, the Court repeatedly cited the fact than an analogous national rule had been considered and rejected. *See Miner*, 363 U.S. at 644-45, 648-51, 80 S.Ct. 1300. The situation here is reminiscent of that scenario: Congress declined to enact a bill sponsored by Senator Paul Simon that was designed to "provide procedural safeguards with respect to the issuance of lawyer client subpoenas." 134 Cong. Rec. 21,589, 21,599 (1988).

Klubock, 832 F.2d at 673 (equally divided en banc) (opinion of Breyer, J.) (suggesting that a local rule imposing standards of review for attorney subpoenas stricter than traditional motion-to-quash standards would fall outside the district court's rulemaking authority).

Moreover, unlike in *Colgrove*, 413 U.S. at 163 n. 23, 93 S.Ct. 2448, there has been no showing here that Local Rule 3.8(f) will [*19] not affect the outcome of criminal proceedings. Indeed, there is every reason to believe that the opposite is true. Local Rule 3.8(f) imposes new substantive requirements applicable only to prosecutors and creates a novel procedural device to ensure that these requirements are enforced. The likely result will be fewer attorney subpoenas served by the government; as the comment to the rule makes clear, the goal is "to limit the issuance of lawyer subpoenas." Certain evidence, as long as a court finds that it is not "essential," will never reach the trier of fact. So, too, when the government decides that the "feasible alternative" to an attorney subpoena is not worth the additional effort. In short, Local Rule 3.8(f), if permitted to stand, will make it measurably more difficult for prosecutors to secure convictions. The magnitude of this new burden is simply too large to be imposed by local rule. Accordingly, the rule cannot stand.

The Third Circuit reached the same conclusion with respect to a closely analogous rule. At issue there was Pennsylvania's analog to Local Rule 3.8(f), which required judicial preapproval for attorney subpoenas in criminal proceedings. *See Baylson*, 975 F.2d at 104. The comment to the rule[7] stipulated that approval normally would be denied unless the court found that the information sought was relevant and not confidential or privileged, that compliance would not be unreasonable or oppressive, that the primary purpose of the subpoena was not harassment, and that there were no feasible alternative means of

[7] The Third Circuit, unlike the panel in *Whitehouse*, *see* 53 F.3d at 1358 n. 12, assumed that trial courts would not ignore the comment in applying the rule. *See Baylson*, 975 F.2d at 109.

obtaining the information sought. *See id.* Although only the "no feasible alternative" requirement was substantively new, the court held that the rule went beyond the "matters of detail" contemplated by Fed.R.Crim.P. 57 and thus transcended local rulemaking authority. See id. at 108-09. Because it requires essentiality as well, Local Rule 3.8(f) represents an even greater encroachment than the rule that confronted the *Baylson* court.

D. Section 530B.

Shortly after the hearing in the district court, Congress passed an omnibus budget bill. The bill contained a provision entitled "Ethical standards for attorneys for the Government," now codified as section 530B, which provides that:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B(a). Bar Counsel asserts that this passage cures any conflict between Local Rule 3.8(f) and other federal law. We do not agree.

"Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous." *Hancock v. Train*, 426 U.S. 167, 179, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976) (footnotes and internal quotation marks omitted). We believe it is reasonable to require comparable specificity before inferring congressional intent to abandon the goal of national consistency anent rules of federal practice. Moreover, that benchmark is not attainable here: it simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate

government attorneys in a manner inconsistent with federal law. We explain briefly.

The federal rules of procedure, unlike state laws, are nationally uniform. *See* 28 [*20] U.S.C. § 2071(a); Fed.R.Crim.P. 57(a)(1); Fed.R.Civ.P. 83(a)(1). In the area of ethics, however, federal district courts generally have adopted their own rules, often modeled on the rules of the state in which they sit, but sometimes with significant deviations. *See, e.g.*, D. Mass. R. 83.6(4)(B) (stating that SJC ethics rules govern "except as otherwise provided by specific rule of this court"). The potential for conflict between state and federal law therefore should have been obvious, but section 530B does not speak to the issue. Instead, Congress directed the Attorney General to fill out the details of enforcement by regulation. See 28 U.S.C. § 530B(b) (empowering the Attorney General to promulgate implementing regulations). These regulations dispel the notion that section 530B grants states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law. *See* 28 C.F.R. § 77.1(b) (directing that section 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law").

The Eleventh Circuit recently had the opportunity to consider the effect of section 530B. That court rejected the argument that the statute cured an incipient conflict between a state ethics rule (which had been incorporated into the federal district court's local rules) and the federal rules of evidence. *See United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir.), cert. denied, --- U.S. ----, 120 S.Ct. 212, 145 L.Ed.2d 178 (1999). The court wrote: "If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms." *Id.* at 1125. We agree with this pronouncement and apply it here: because Local Rule 3.8(f) impermissibly interferes with federal grand jury practice and transcends district court rulemaking authority, section 530B cannot salvage it.

If more were needed--and we doubt that it is--Local Rule 3.8(f) clearly extends beyond the shelter that section 530B provides. Although the statutory text, which refers to "State laws and rules, and local Federal court rules, governing attorneys," is arguably susceptible to a broad interpretation, we have noted before that a statute's caption may assist in clarifying ambiguities. *See, e.g., Massachusetts Ass'n of HMOs*, 194 F.3d at 180; *Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4, 9 (1st Cir.1991). The title of the statute here ("Ethical standards for attorneys for the Government") removes any doubt about its scope: section 530B applies only to ethical standards. This conclusion becomes irresistible in light of the legislative history and implementing regulations. *See, e.g.*, H.R. Conf. Rep. No. 105-825, at 1102 (1998); 144 Cong. Rec. E301 (daily ed. Mar. 5, 1998) (statement of sponsor, Rep. McDade); 28 C.F.R. §§ 77.1(b), 77.2(h).[8]

That ends the matter. Local Rule 3.8(f), though doubtless motivated by ethical concerns, has outgrown those humble beginnings. Substance, not form, must control. *See* 28 C.F.R. § 77.2(h)(1) (explaining that the applicability of section 530B does not depend on "whether or not [the state or local] rule is included in a code of professional responsibility for attorneys"). As written, Local Rule 3.8(f) is more than an ethical standard. It adds a novel procedural step--the opportunity for a pre-service adversarial hearing-- and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind.

In recommending the deletion of subparagraph (2) from the former ABA Model Rule, the Standing Committee explained [*21] that the judicial preapproval provision was an anomaly: "Rather than stating a substantive ethical precept, it sets out a

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[8] Unlike Bar Counsel, we do not ascribe much weight to the dire predictions of broader applicability made by *opponents* of section 530B. *See, e.g.*, 144 Cong. Rec. S12,996-97 (daily ed. Nov. 12, 1998) (statement of Sen. Abraham); 144 Cong. Rec. S12,798-99 (daily ed. Oct. 21, 1998) (statement of Sen. Hatch).

type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm." ABA Standing Comm. on Ethics and Prof'l Responsibility, Report 101, at 7 (Aug.1995). We agree with this assessment. Because Local Rule 3.8(f) goes beyond the realm of ethics, section 530B neither rescues it nor renders the instant case moot.[9] *Cf. CSC II*, 189 F.3d at 1283-89 (relying on section 530B to uphold an ethics rule consisting of subparagraph (1) but without any provision for an adversarial hearing).

IV. CONCLUSION

We need go no further. We conclude that the authority of the district court to adopt Local Rule 3.8(f) is ripe for judicial review and that the two subparagraphs of the rule are to be read together. Thus, the substantive standards delineated in subparagraph (1) must guide a court in determining whether to approve an attorney subpoena in a pre-service hearing held pursuant to subparagraph (2). We also conclude that the adoption of Local Rule 3.8(f) exceeded the district court's lawful authority to regulate both grand jury and trial subpoenas. Finally, we conclude that 28 U.S.C. § 530B does not repair these defects. Accordingly, we hold that Local Rule 3.8(f) is without force or effect.

Reversed.

Before TORRUELLA, Chief Judge, COFFIN, Senior Circuit Judge, SELYA, BOUDIN, STAHL, LYNCH* and LIPEZ, Circuit Judges.

ORDER

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[9] For essentially the same reason, Local Rule 3.8(f) is beyond the district court's inherent authority to regulate the conduct of attorneys appearing before it.

* Judge Lynch is recused from this case.

June 22, 2000.

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing en banc having been carefully considered by the judges of the Court in regular, active service not recused, and an appeal being heard or reheard by the Court en banc,

It is ordered that the petitions for rehearing and the suggestions for rehearing en banc be denied.

Dissent follows.

TORRUELLA, Chief Judge, with whom Judge Stahl and Judge Lipez join, dissenting from the denial of the petitions for rehearing en banc.

In this case there has been a recusal by one active judge. As interpreted by this Court in *United States v. Leichter*, 167 F.3d 667 (1st Cir.1999), recused judges are counted for purposes of determining what constitutes the absolute majority of the active members deemed necessary for en banc hearing. *See* 28 U.S.C. § 46(c); Fed.R.App.P. 35(a)(1) and (2). Thus, there are not sufficient votes favoring said outcome. This is unfortunate because the substance of the panel opinion makes it a prime candidate for en banc consideration in that the panel opinion both (1) "fails to maintain uniformity with this Court's [prior] decisions" and (2) "involves a question of exceptional importance." *See* Fed.R.App.P. 35(a)(1) and (2).

Leaving aside the result in *United States v. Klubock*, 639 F.Supp. 117 (D.Mass.1986), *aff'd*, 832 F.2d 664 (1st Cir.1987) (equally divided en banc court), it is difficult to conclude that the panel opinion in *Stern v. United States District Court*, No. 99-1839, slip op. (1st Cir. Apr. 12, 2000), is anything but a reversal of the panel opinion in *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir.1995). This outcome contravenes [*22] sound and well-established

legal principles regarding the binding nature of panel opinions upon later panels considering the same or closely similar issues. *See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10, 12 (1st Cir.1991) ("We have held, with regularity bordering on the monotonous, that in a multi-panel circuit, newly constituted panels are, by and large, bound by prior panel decisions closely in point .... The orderly development of the law, the need for stability, the value of results being predictable over time, and the importance of evenhanded justice all counsel continued fidelity to this principle."); *United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir.1991) ("We have held, time and again, that in a multi-panel circuit, prior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent.").

In *Whitehouse*, in considering a disciplinary rule similar to the one before the Stern panel, we reversed the district court's invalidation of the rule and stated:

> We disagree with the district court for three reasons. First, Local Rule 3.8(f) is a prophylactic rule aimed at, and principally affecting, prosecutors, not the grand jury. As such, the Rule regulates the conduct of attorneys appearing before the court--a power well within the limits of a federal district court's rulemaking authority--and not the grand jury per se. Second, we think the district court's reliance on Williams [United States v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992)], is misplaced. Finally any incidental effect the Rule has on the grand jury is minimal, and outweighed by the important interests served by the rule.

Whitehouse, 53 F.3d at 1357.

By focusing on the third point mentioned in *Whitehouse*, the *Stern* panel mischaracterizes the central ruling in *Whitehouse*, which is that a district court has authority to regulate prosecutors' conduct qua members of the bar, as in the case of any other members of the bar. Furthermore, the *Stern* panel

totally overlooks the importance given by the *Whitehouse* panel to a local rule which was designed to protect the attorney-client relationship and fails to give due deference to district courts in regulating matters peculiarly within their daily experience. *See Whitehouse*, 53 F.3d at 1360-62.

The fundamental issue of the district court's recognized authority to regulate attorney conduct (in contrast to its very limited authority to regulate the grand jury itself) warranted no more than a footnote in the panel decision in *Stern*, in which the panel stated that "[w]hile we are bound by the holding of *Whitehouse*, we eschew this component of its reasoning." *Stern*, at ---- n. 4. The *Stern* panel's support for such a rejection of binding circuit precedent consisted merely of (1) a statement that grand jury subpoenas are normally issued by prosecutors and not by the grand jury itself (which is true, but is irrelevant to the distinction between the district court's authority in the two areas of attorney conduct and grand jury administration) and (2) a citation to *United States v. Williams*, supra, which we explicitly considered in *Whitehouse* and found distinguishable. Based on these actions alone, en banc review is required. *See* Fed.R.App.P. 35(a)(1).

But there are additional grounds. There are few matters that are more central to the district court's ability to administer justice than is the prudent exercise of its supervisory powers over the bar. This is a power that has been recognized as inherent in the courts. The establishment of rules of conduct for attorneys is an integral part of this power. The talismanic word is not "grand jury" but "ethics." A member of the bar is subject to rules of conduct that govern professional actions irrespective of the forum. A prosecutor is not immunized from ethical considerations because his or her conduct takes place in connection with grand jury proceedings. [*23] That is all that is involved in this and previously decided cases. *See Whitehouse, supra.*

These considerations point to the undeniable conclusion that the issues raised by this appeal are "question[s] of exceptional

importance" meriting a rehearing en banc by the full court. Fed.R.App.P. 35(a)(2).

I dissent from the denial of the petitions for rehearing en banc.

Donald K. STERN, in his official capacity as United States Attorney for the District of Massachusetts, et al., Plaintiffs v. SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS, et al., Defendants

No. CIV. 98-CV-10896-B

United States District Court, D. Maine

Jan. 20, 1999

184 F.R.D. 10 (1999)

[*11]

Order and Memorandum of Decision

Brody, District Judge

In this action for declaratory and injunctive relief, Plaintiff Donald K. Stern, United States Attorney for the District of Massachusetts, seeks to prevent enforcement of Rule 3.8(f) of the Massachusetts Rules of Professional Conduct ("Rule 3.8(f)" or "the Rule").[10] Defendants are the United States District Court for the District of Massachusetts ("District Court"), the United States District Court Judges for the District of Massachusetts ("District Court Judges"), and Arnold R. Rosenfeld, Bar Counsel for the Board of Bar Overseers ("Rosenfeld").[11] Currently before the Court are Plaintiff's Motion for

[10] By stipulation dated October 2, 1998, the parties dismissed Craig C. Donsanto, Director, Election Crimes Branch, Criminal Division, Department of Justice, as a plaintiff in the case.

[11] By stipulation dated October 2, 1998, the parties dismissed the Supreme Judicial Court of Massachusetts and the Massachusetts Board of Bar Overseers as defendants in the case.

Preliminary Injunction and Defendants District Court and District Court Judges' Motion to Dismiss for lack of ripeness. At an October 6, 1998 hearing on these motions, the parties agreed that resolution of Plaintiff's claims for permanent and declaratory relief also was appropriate at this time and that they be consolidated for disposition. For the reasons set forth below, Defendants' Motion to Dismiss is DENIED and Plaintiff's requests for preliminary and permanent injunction and declaratory judgment also are DENIED.

I. BACKGROUND

Rule 3.8(f) was promulgated by the Supreme Judicial Court of Massachusetts as an amendment to the Massachusetts Rules of Professional Conduct. The Rule governs the conduct of prosecutors who seek to subpoena a lawyer to testify about a client. It provides as follows:

> The prosecutor in a criminal case shall . . .
>
> [*12]
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> 1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> (iii) there is no other feasible alternative to obtain the information; and
>
> 2) the prosecutor obtains prior judicial approval after an opportunity for a prior adversarial proceeding.

Mass. R. Prof. Conduct 3.8(f).

The United States District Court for the District of Massachusetts adopted Rule 3.8(f) pursuant to Local Rule 83.6(4) of that court, which provides that the Massachusetts Rules of Professional Conduct govern the conduct of lawyers appearing before the United States District Court for the District of Massachusetts "except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth." Local R. 83.6(4)(b) of the United States District Court for the District of Massachusetts. In a letter to the District Court dated November 17, 1998, Plaintiff Stern requested that it decline to adopt Rule 3.8(f). Chief Judge Tauro responded by letter stating that after extensive discussion of the issue among the District Judges, "the court declines at this time to modify Local Rule 83.6" so as to except Rule 3.8(f) from its reach. (Compl. P 10.) He also noted that "to the degree that the issues discussed in your letter of November 17 may require resolution, the court anticipates that this will be done in particular cases or controversies appropriate for judicial determination." Id.

Rule 3.8(f) subsequently took effect in the Commonwealth of Massachusetts and in the United States District Court for the District of Massachusetts on January 1, 1998. It applies to all state and federal prosecutors who are members of the Bar of the Supreme Judicial Court of Massachusetts and to all federal prosecutors appearing before the United States District Court for the District of Massachusetts.[12]

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[12] The Supreme Judicial Court and the Board of Bar Overseers monitor the compliance of their members with all Massachusetts Rules of Professional Conduct, including Rule 3.8(f.). The United States District Court enforces Rule 3.8(f) with respect to attorneys appearing before it. In his affidavit, Defendant Rosenfeld states that the Board of Bar Overseers would not institute disciplinary action pursuant to Rule 3.8(f)

Prior to the adoption of Rule 3.8(f), service of subpoenas on lawyers by federal and state prosecutors in Massachusetts was governed by Supreme Judicial Court Rule 3.08, PF 15 ("Rule 3.08").[13] While former Rule 3.08 simply required prosecutors to seek judicial approval before subpoenaing lawyers to testify about their clients in front of a grand jury, Rule 3.8(f) additionally provides for the opportunity for an adversarial hearing and sets forth three criteria about which a prosecutor must have a reasonable belief. The First Circuit upheld former Rule 3.08 against a challenge by federal prosecutors much like the one raised here. *See United States v. Klubock*, 832 F.2d 664, 667-68 (1st Cir. 1987) (en banc) (evenly divided court).

Just as under prior practice pursuant to former Rule 3.08, federal prosecutors seeking to subpoena a lawyer regarding a client in a 3.8(f) regime are subject to guidelines pro-[*13] mulgated by the Department of Justice. The guidelines provide that before approving such a subpoena, the Assistant Attorney General for the Criminal Division must apply the following principles:

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against federal prosecutors who are members of the Bar of the Supreme Judicial Court of Massachusetts practicing in a state or federal court outside the Commonwealth. (Rosenfeld Aff. ¶ 9.) As the party responsible for prosecuting violations of the Massachusetts Rules of Professional Conduct on behalf of the District Court, Defendant Rosenfeld further states that any disciplinary action pursuant to Rule 3.8(f) against a federal prosecutor in connection with a proceeding in the United States District Court for the District of Massachusetts will be initiated in federal court, not in state court or before the Board of Bar Overseers. (Rosenfeld Aff. ¶ 8.)

[13] Rule 3.08 provided that: It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness. *Klubock*, 832 F.2d at 650.

• The information sought shall not be protected by a valid claim of privilege.

• All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.

• In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information . . . .

• The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.

• The subpoena must be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

United States Attorney's Manual § 9-13.410.

In support of his Motion for Preliminary Injunction, Plaintiff asserts that from November 1993 to September 1997, the United States Attorney for the District of Massachusetts sought authorization from the Department of Justice to serve approximately 199 subpoenas on lawyers concerning their present or former clients. Plaintiff also represents that when Rule 3.8(f) took effect he ordered a moratorium on all subpoenas to lawyers pending the outcome of this action. At this time, Plaintiff states that his office has at least 26 subpoenas to lawyers awaiting issuance. (Stern Aff. P 15.)

II. MOTION TO DISMISS

The District Court and the District Court Judges move this Court to dismiss Plaintiff's claim for lack of subject matter jurisdiction on the ground that it is unripe or, in the alternative, to decline to decide the case in an exercise of its discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201-2202 (1994). The Court finds Defendants' arguments sound, and acknowledges that under some circumstances, they might be dispositive. Nevertheless, the Court is convinced that this controversy is amenable to resolution as currently configured and that resolution is desirable at this time as a matter of practical necessity and in the interest of judicial economy.

The issue for decision in this case is whether the District Court has the power to adopt Rule 3.8(f). As evidenced by the discussion of the merits set forth below, this is primarily a legal question resolution of which would not be aided by further factual development. *See State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir. 1994) (finding case ripe, in part, because statutory interpretation is purely legal issue). Moreover, the issue has been well-briefed and argued by the parties. Dismissal at this stage would lead to redundant and piecemeal proceedings throughout the District of Massachusetts. Finally, and in the Court's view most importantly, this matter has been pending before the courts for over seven months. During that time, Plaintiff's self-imposed moratorium on subpoenas to lawyers has delayed the service of over 26 subpoenas and presumably compromised multiple grand jury investigations. The Court is persuaded that prompt resolution of the issue is warranted in the interest of all concerned. Recent passage of 28 U.S.C. § 503B only strengthens the Court's position that its decision is both timely and correct.[14] The

[14] During the pendency of this action, the President signed into law H.R. 4276 § 811, to be codified at 28 U.S.C. § 503B ("Section 503B").

Court [*14] therefore exercises its discretion to decide this case. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 286, 132 L. Ed. 2d 214, 115 S. Ct. 2137 (1995) ("the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants"). Defendants' Motion to Dismiss is denied.

III. INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff seeks a preliminary and permanent injunction against enforcement of Rule 3.8(f), as well as declaratory relief. To merit a preliminary injunction, a movant must

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The statute, which is scheduled to take effect on April 19, 1999, provides as follows:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in the State.

28 U.S.C. § 503B(a).

While Section 503B does not definitively settle the issue presented in this case, as Defendants claim, it nevertheless is relevant. Assuming Section 503B becomes effective, which Plaintiff argues is far from certain, Rule 3.8(f) would apply to federal prosecutors appearing in federal court in the Commonwealth of Massachusetts as a state ethical rule regardless of whether the District Court had ever adopted it. Presumably, however, the application of the Rule by the state still would be subject to challenge on Supremacy Clause grounds if it conflicted with the Constitution or the Federal Rules of Criminal Procedure. Similarly, as Plaintiff points out, Section 503B cannot empower district courts to adopt rules governing the behavior of attorneys that squarely conflict with the Constitution or federal law. If Rule 3.8(f) is inconsistent with the Federal Rules of Criminal Procedure or federal common law governing a district court's power to regulate the grand jury, as Plaintiff alleges, it cannot legitimately be adopted by the District Court. Thus, neither the recent adoption of Section 503B nor its future application eliminate the need for a court to resolve the issues presented in this case. On the other hand, once a court has concluded that Rule 3.8(f) is consistent with the Rules of Criminal Procedure and other rules governing the grand jury, the enactment of Section 503B leaves no doubt that Congress intended to give district courts the power to adopt it.

establish four criteria: (1) that irreparable harm will result to the movant if the injunction is not granted; (2) that the harm to the movant from a denial of an injunction outweighs the harm to the defendant caused by a grant of injunction; (3) that the movant is likely to succeed on the merits; and (4) that a grant of injunction would not adversely affect the public interest. *See AFL-CIO Laundry & Dry Cleaning Int'l Union v. AFL-CIO Laundry*, 70 F.3d 717, 718 (1st Cir. 1995). "Where, as here, the action has been consolidated--allowing the parties a full opportunity to present the merits of their cases--and permanent injunctive relief is involved, the standard of review is essentially the same except that the movant must show actual success on the merits rather than a mere likelihood." *K-Mart Corp. v. Davis*, 756 F. Supp. 62, 66 (D. P.R. 1991) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987)). Likewise, a request for declaratory relief requires resolution on the merits. Thus, the Court now turns to the merits of the case.[15]

As mentioned above, the Massachusetts Supreme Judicial Court and the United States District Court for the District of Massachusetts have required prosecutors to seek judicial approval before subpoenaing lawyers to testify about their clients in front of a grand jury since 1986 pursuant to Supreme Judicial Court Rule 3.08. Rule 3.8(f) differs from former Rule 3.08 in two relevant ways: first, it lists three specific criteria about which a prosecutor must have a reasonable belief before subpoenaing a lawyer; and second, it mandates the opportunity for an adversarial hearing. The issue in this case is whether the additional requirements of Rule 3.8(f) are within the District Court's rule-making power as delineated by the

[15] Since the Court concludes that Plaintiff is not entitled to prevail on the merits of his claim, it need not consider whether Plaintiff has satisfied the other requirements for injunctive relief, nor the issue raised by the parties concerning the appropriate standard for injunctive relief where the movant is a government entity.

First Circuit in *Klubock v. United States*, 832 F.2d 664 (1st Cir. 1987) in which former Rule 3.08 was found to have been validly adopted, and *Whitehouse v. United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1st Cir. 1995), a subsequent case upholding the adoption of a similar local rule by the District Court for the District of Rhode Island.

The power of a district court to enact [*15] rules derives from 28 U.S.C. § 2071(a),[16] Rule 57 of the Federal Rules of Criminal Procedure,[17] and "certain inherent rule-making powers arising from the nature of the judicial process." *Whitehouse*, 53 F.3d at 1355. A rule is presumptively valid unless: 1) the rule conflicts with an Act of Congress; 2) the rule conflicts with the Federal Rules of Criminal Procedure; 3) the rule is constitutionally infirm; or 4) the subject matter governed by the rule is not within the power of the district court to regulate. Id. Plaintiff claims that Rule 3.8(f) conflicts with Rules 6(e), 17, and 57 of the Federal Rules of Criminal Procedure, as well as with federal common law governing a district court's supervisory power over the grand jury. Specifically, Plaintiff objects to three portions of the Rule: 1) the requirement of prior judicial approval; 2) the requirement of an adversarial hearing; and 3) the ethical requirements imposed on prosecutors. He argues that these features render Rule 3.8(f) beyond the District Court's rule-making power because they involve the

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[16] 28 U.S.C. § 2071(a) provides: The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. 28 U.S.C. § 2071(a)(1994).

[17] Rule 57 of the Federal Rules of Criminal Procedure provides in relevant part: (a)(1) Each district court by action of a majority of the judges thereof may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with - but not duplicative of-Acts of Congress and rules adopted under 28 U.S.C. § 2072. Fed. R. Crim. P. 57.

district court substantively in the subpoena process and compromise the grand jury's secrecy and investigative functions.

Defendants respond that Plaintiff's claims are foreclosed by *Whitehouse*. In *Whitehouse*, the First Circuit considered a local rule adopted by the District Court for the District of Rhode Island ("Rhode Island rule"). The Rhode Island rule is similar to Rule 3.8(f) except that its substantive criteria and requirement of an opportunity for an adversarial hearing are contained in a comment to the rule, rather than its text.[18] In upholding the Rhode Island rule, the Court found that the rule was not inconsistent with Rules 17 and 57 of the Federal Rules of Criminal Procedure. *See id.* at 1362-65. The Court also found that the rule did not constitute an invasion of the province of the grand jury by the district court because it regulated the conduct of lawyers, not that of grand juries, and concluded that the district court had the power, whether statutory or inherent, to enact a "prophylactic rule[ ] to regulate perceived abuse by attorneys." Id. at 1356.

Whitehouse was the Court's observation that the Rhode Island rule's requirements that the information be "essential" and that there be no "feasible alternative" to obtain it were contained in a non-binding comment. See id. at 1357 n.12. Indeed, the Court strongly suggested that had these requirements been binding, the rule would have worked a change in the substantive law concerning grand juries by extending the showing required to obtain prior judicial approval for a subpoena beyond the showing

[18] The text of the Rhode Island rule upheld by the First Circuit provides: The prosecutor in a criminal case shall: (f) not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship. *Whitehouse*, 53 F.3d at 1353.

required for a successful motion to quash.[19] *See id.* at 1358 n.12. The Court affirmed the district court's authority to adopt the rule as written, however, because "in effect [it] merely changed the timing with respect to motions to quash." *Id.* at 1358.

Plaintiff maintains that the textual differences between Rule 3.8(f) and the [*16] Rhode Island rule distinguish this case from *Whitehouse*. This contention is based, in large part, on Plaintiff's interpretation of Rule 3.8(f) as mandating that a prosecutor demonstrate the criteria specified in Rule 3.8(f)(1)(i-iii) in order to obtain judicial approval of a subpoena. According to Plaintiff, the imposition of the requirements that a prosecutor demonstrate that the information sought is "essential" and that "there is no other feasible alternative to obtain the information" exceeds the district court's rule-making authority because such a showing goes far beyond matters considered in the context of a motion to quash. Furthermore, Plaintiff's reading of Rule 3.8(f) as requiring that this showing be made at an adversarial hearing prompts Plaintiff to argue that the Rule compromises grand jury secrecy to a far greater extent than previous practice pursuant to former Rule 3.08.

Defendants do not seriously challenge Plaintiff's assertion that Rule 3.8(f) was invalidly adopted if Rule 3.8(f)(2) incorporates the requirements of Rule 3.8(f)(1). In fact, Defendant Rosenfeld conceded at oral argument that if the Rule is so interpreted, *Whitehouse* may well preclude its lawful adoption by the District Court. However, Defendants vigorously contest Plaintiff's reading of Rule 3.8(f). They argue that the criteria enumerated in Rule 3.8(f)(1) are independent of Rule

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[19] A subpoena will be quashed if (1) the material sought is privileged or (2) compliance would be unreasonable or oppressive. *See id.*, 53 F.3d at 1357 (citing *Branzburg v. Hayes*, 408 U.S. 665, 688, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972)).

3.8(f)(2)'s requirement of prior judicial approval and an opportunity for an adversarial hearing, and that the existence of a prosecutor's reasonable belief as to those criteria merely constitutes permissible grounds for the District Court to initiate discipline against a prosecutor.[20] In Defendants' view, the nature of the inquiry for prior judicial approval is therefore no different from that which occurred under former Rule 3.08 and no more burdensome on a grand jury than the process triggered by a motion to quash. Thus, Defendants argue, the District Court's power to adopt rule 3.8(f) is clearly established by *Klubock* and *Whitehouse*.

In order to resolve this controversy, the Court will examine each of the three aspects of Rule 3.8(f) -- its requirement of prior judicial approval, its mandate of an opportunity for an adversarial hearing, and its ethical standards -- which Plaintiff claims render it beyond the District Court's power to adopt. However, since analysis of each of these requirements depends to some extent on whether, as Plaintiff argues, Rule 3.8(f)(2) incorporates the criteria of Rule 3.8(f)(1), it is first necessary for the Court to construe the Rule.

The Court finds that Rule 3.8(f) does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2).[21] This reading of the

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[20] Defendant Rosenfeld avers that this is his interpretation of Rule 3.8(f). (Rosenfeld Aff. ¶ 10.)

The District Court and the District Court Judges take the position that this interpretation of Rule 3.8(f) is an entirely reasonable alternative to the one put forth by Plaintiff. They note, however, that they refrain from arguing in favor of any particular interpretation to avoid rendering an advisory opinion.

[21] The Court notes, however, that as a practical matter, a court faced with a request for an attorney-subpoena is likely to engage in a similar inquiry in the course of determining whether issuance of the subpoena is appropriate.

Rule is based on several considerations. First, careful examination of the plain language of Rule 3.8(f) indicates that Rule 3.8(f)(2) does not incorporate the criteria of 3.8(f)(1): the criteria are required objects of a prosecutor's reasonable belief, not the basis for judicial approval. That this interpretation of the text of Rule 3.8(f) is correct becomes more clear when contrasted with the text of the comment to the Rhode Island rule which states in relevant part:

> The committee believes that a court called upon for judicial approval should be guided by appropriate standards. Accordingly, *prior judicial approval should be withheld unless* (1) the information sought is not protected from disclosure by an applicable privilege, (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution and is not merely peripheral, cumulative, or speculative . . . (5) the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non- [*17] attorney sources and there is no feasible alternative to obtain the information. *Whitehouse*, 53 F.3d at 1366 app. A (emphasis added) (internal citation omitted). Second, Plaintiff presents no reasons why Rule 3.8(f) should be interpreted otherwise and absolutely no evidence, beyond bare assertion, that it will be.

To the extent that Plaintiff's requests for declaratory and injunctive relief are premised on the *possibility* that other courts will interpret Rule 3.8(f) differently when presented with an attorney-subpoena, the Court finds that such speculation has no impact on the issue for decision in this case, that is, whether the District Court had authority to adopt Rule 3.8(f). The Rule as written need not be construed to conflict with other statutes nor to exceed the District Court's rule-making power, and there is no reason to suppose that it would be so construed. See id. at 1358 n.12. Furthermore, in the event that the parties

or other courts do not find this Court's reasoning regarding the construction of the Rule persuasive, such conflicts appropriately may be resolved at the Circuit level.

Before examining each of the three requirements of Rule 3.8(f) to which Plaintiff objects, the Court will address two opinions from other jurisdictions, *Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102 (3rd Cir. 1992) and *United States v. Colorado Supreme Court*, 988 F. Supp. 1368 (D. Colo. 1998), which Plaintiff cites throughout his brief in support of his position that the Rule was invalidly adopted. In Baylson, the Third Circuit invalidated the adoption by the District Court for the District of Pennsylvania of a state disciplinary rule virtually identical to the Rhode Island rule which the First Circuit found validly adopted three years later in *Whitehouse*. *See Baylson*, 975 F.2d at 104. The Court in *Whitehouse* noted that *Baylson* did not address the question of whether the local rule was beyond the district court's power to adopt and explicitly rejected the *Baylson* court's finding that the local rule conflicted with the Federal Rules of Criminal Procedure. See *Whitehouse*, 53 F.3d at 1356, 1362-1365. For these reasons, this Court finds Plaintiff's reliance on *Baylson* misplaced.

In *Colorado Supreme Court*, the district court considered a disciplinary rule ("Colorado rule") which forbade a prosecutor from subpoenaing a lawyer to a grand jury to testify about a client unless the prosecutor reasonably believed that the information sought was (i) not privileged, (ii) essential to the successful completion of an ongoing investigation, and (iii) unobtainable by any feasible alternative means. *See Colorado Supreme Court*, 988 F. Supp. at 1370. Federal prosecutors sought injunctive and declaratory relief from application of the rule to them by the Disciplinary Board of the State Supreme Court. *See id.* at 1369. The district court held

that the rule placed impermissible restraints on the grand jury rendering it inconsistent with federal law, and that its application by the state to federal prosecutors therefore violated the Supremacy Clause. *See id.*

The Court is unpersuaded by *Colorado Supreme Court* for several reasons. First, the case is readily distinguishable from the one at bar because in that case the district court did not have occasion to consider whether a federal district court had the authority to adopt the rule since the prosecutors brought suit only against the state court. Second, despite the textual symmetry between the Colorado rule and Rule 3.8(f)(1), the Court does not agree that such rules impermissibly restrain the grand jury. Rule 3.8(f)(1), which the Court has concluded is not incorporated into Rule 3.8(f)(2), does not affect the grand jury; rather, it is merely an ethical rule governing prosecutors. As such, it is well within a federal district court's power to adopt. *See Whitehouse*, 53 F.3d at 1356, 1364.

The Court now resolves Plaintiff's objections to Rule 3.8(f)'s requirements of prior judicial approval and an opportunity for an adversarial hearing, and to the Rule's ethical proscriptions.

1. Prior judicial approval

The Court's finding that Rule 3.8(f)(2) does not incorporate the criteria of 3.8(f)(1) [*18] makes clear that Rule 3.8(f)'s requirement of prior judicial approval is no different from the requirement of prior judicial approval contained in former Rule 3.08 which was upheld in *Whitehouse*. *See id.* at 1357-58. Thus, the Court holds, as it must under binding precedent, that the District Court's adoption of Rule 3.8(f)(2)'s requirement of prior judicial approval is a valid act of its rule-making authority.

2. Adversarial Hearing

Given the Court's interpretation of Rule 3.8(f), Plaintiff's argument that the Rule's requirement of the opportunity for an adversarial hearing renders adoption of the Rule invalid is not persuasive. Since a prosecutor is not required to demonstrate that the information sought is "essential," nor that there is "no feasible alternative source for the information," the substance of the disclosure at an adversarial hearing pursuant to Rule 3.8(f) is no greater than the disclosure required to survive a motion to quash. The same degree and timing of disclosure already has been upheld by the First Circuit in *Whitehouse*. *See id.* at 1358 (finding former Rule 3.08 "merely changed the timing with respect to motions to quash"). Moreover, nothing in Rule 3.8(f) prevents a court, in the exercise of its discretion, from holding the adversarial hearing in camera to protect material from public disclosure as regularly is done in the context of motion to quash.[22] *See id.*

Plaintiff maintains, however, that disclosure of grand jury material even to the target of the subpoena and to counsel threatens the secrecy and investigative function of the grand jury. He argues that Rule 3.8(f)'s requirement of an opportunity for an adversarial hearing will result in such disclosure and thus can be distinguished as more violative of grand jury secrecy than former Rule 3.08 under which application for prior judicial approval was made ex parte and under seal.

Plaintiff's concern is unfounded. The Court observes that if disclosure would be detrimental in a specific case, Rule 3.8(f) does not preclude a court from receiving ex parte submissions as occurs with regard to motions to quash. *See, e.g., In re Grand Jury Proceedings (Hill),*

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[22] The Court notes that an in camera hearing likely would be necessary in every instance in order to preserve grand jury secrecy. Judge Woodlock concurs. (Woodlock Aff. ¶ 16.)

786 F.2d 3, 7-8 (1st Cir. 1986) (upholding submission of ex parte affidavits by government in opposition to motion to quash); *In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958, 966 (D. Mass. 1985) (same); *In re Grand Jury*, 103 F.3d 1140, 1145 (3rd Cir.) (same), *cert. denied*, 117 S. Ct. 2412 (1997); *see also* Woodlock Aff. ¶¶ 14-16. For this reason, the requirement of an opportunity for an adversarial hearing presents no more risk of disclosure than did former practice under Rule 3.08 or present practice on a motion to quash, nor does the requirement conflict with Rule 6(e)(5-6) of the Federal Rules of Criminal Procedure.[23]

Plaintiff additionally claims that an opportunity for an adversarial hearing will cause delays that will interfere with grand jury investigations. The Court finds this argument without merit. First, as Defendants point out, nothing in the Rule prevents a grand jury from overcoming delay by exercising its own subpoena power. Second, Plaintiff presents no evidence that more attorneys will avail themselves of Rule 3.8(f)'s opportunity to avoid a subpoena than the small number who file motions to quash. Third, given that the substance of the two inquiries is the same, the Court finds it likely that any adversarial hearing which does occur will likely eliminate the need for a motion to quash. Thus, the opportunity for an ad-[*19]

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[23] Rule 6(e)(5) provides:

> Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

Fed. R. Crim. P. 6(e)(5).

> Rule 6(e)(6) provides:
> Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(6).

versarial hearing prior to the issuance of a subpoena will cause no greater delay than a post-issuance motion to quash. Fourth, the Rule does not prevent adversarial hearings from being held on an expedited basis if necessary.[24] Finally, speculation regarding delay does not impact the question of whether the District Court has the power to adopt Rule 3.8(f). If, in fact, the application of the adversarial hearing requirement results in delays that threaten the grand jury process, Plaintiff may seek redress at that time.

3. Ethical Standards

At oral argument, Plaintiff for the first time appeared to challenge the District Court's adoption of the ethical criteria of Rule 3.8(f)(1). Plaintiff expressed concern that a prosecutor would be disciplined for a failure to present sufficient evidence to a judge that the subpoena sought concerned "essential" information and that there existed "no other feasible alternative to obtain the information."[25] Here too, however, the Court's interpretation of Rule 3.8(f) negates Plaintiff's concern because no such showing is required to obtain prior judicial approval of a subpoena.

Plaintiff nevertheless objects to the district court's imposition of these ethical requirements on prosecutors because the threat of discipline concerning a prosecutor's own alleged lack of a "reasonable belief" as to the criteria set forth in Rule 3.8(1) will chill prosecutors in the discharge of their responsibilities with respect to grand juries. In particular, Plaintiff anticipated that disgruntled targets of grand jury investigations whose lawyers had

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[24] Judge Woodlock states that Local Rule 40.4(a)(2) provides that motions related to grand jury investigations may receive prompt consideration. (Woodlock Aff. ¶ 17.)

[25] Defendant Rosenfeld states in his affidavit that he would not bring disciplinary action against prosecutors on this basis. (Rosenfeld Aff. ¶ 11.)

been subpoenaed will instigate disciplinary action against prosecutors. In addition, Plaintiff argued that the ethical requirements of Rule 3.8(1) are unnecessary because the attorney-client relationship is adequately protected by the Department of Justice Guidelines for attorney-subpoenas.

The Court acknowledges that Rule 3.8(f) subjects federal prosecutors to discipline for lack of a reasonable belief concerning the criteria listed in Rule 3.8(f)(1). Rule 3.8(f) is an ethical rule. As the Court has noted elsewhere in this opinion, however, the First Circuit has made clear that a district court has the power to adopt ethical rules governing attorneys so long as they do not violate the Constitution or statute. *See Whitehouse*, F.3d at 1356, 1364. Neither Plaintiff's opinion concerning the wisdom and necessity of Rule 3.8(f) nor his speculation regarding its consequences are grounds for invalidating its adoption. Moreover, the enactment of 28 U.S.C. § 503B signals Congress's belief that the Department of Justice guidelines are insufficient and its desire that the states and the federal courts play a greater role in governing the conduct of government attorneys.

Because the Court finds that Plaintiff does not succeed on the merits of his claim, his requests for injunctive and declaratory relief are denied.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss is DENIED and Plaintiff's requests for a preliminary and permanent injunction and declaratory judgment are also DENIED.

Supreme Court, U.S.
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No. 00-425

IN THE

Supreme Court of the United States

DANIEL C. CRANE,

Petitioner,

v.

DONALD K. STERN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ORGANIZATION OF BAR COUNSEL IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Organization of Bar Counsel (NOBC) is a non-profit organization whose members enforce ethical rules that regulate the professional conduct of lawyers. More than four hundred fifty (450) members of NOBC serve as disciplinary counsel to state and federal courts and bar associations in all the disciplinary jurisdictions in the United States.[1] Most of the NOBC members work under the auspices of a state's highest court and/or the state bar association responsible for the regulation of the bar. The NOBC assists lawyer disciplinary agencies by providing training to its members, preparing an annual compilation of case summaries on attorney disciplinary matters, offering information on specific legal subjects such as ethical rules and professional responsibility issues, and advocating positions on behalf of its members with the American Bar Association and other entities with interests in the regulation of lawyer discipline and professional responsibility matters for lawyers.

NOBC's interest as an amicus in this case is to express its serious concern with, and opposition to, the holding in the decision of the First Circuit Court of Appeals in *Stern v. United States District Court for the District of Massachusetts, et al.*, 214 F.3d 4 (1st Cir. 2000), which endorses the position of the Justice Department that its lawyers can be exempted from abiding by some state ethical rules, adopted by a state's highest court, and incorporated by a United States District Court. In the opinion of NOBC, if this ruling is not reversed, it will lead to serious problems for bar disciplinary counsel in all jurisdictions.

1. Counsel for the *Amicus* were the sole authors of this brief and no person or entity other than the *Amicus* made a financial contribution to this brief. The consents of the parties have been lodged herewith.

STATEMENT OF THE CASE

Amicus Curiae relies on the Statement of the Case submitted by the Petitioner, Daniel C. Crane, Bar Counsel, *et al.*, in his Petition for a Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

There are two major reasons why this Court should grant certiorari. First, this decision will create a situation in which there will be unequal treatment of attorneys practicing in a jurisdiction. While all other lawyers will be required to abide by all ethical rules promulgated by a state and incorporated by a United States District Court, Justice Department attorneys will be required to obey only those professional conduct rules it deems are consistent with federal law or procedure. No other lawyer has that right of determination. This ruling usurps the authority of the state and federal courts to establish and enforce ethical rules for all lawyers who are members of the bar of that state, and thereby will restrict bar disciplinary agencies' enforcement authority.

Second, this ruling allows the Justice Department to decide unilaterally which ethical rules it chooses to follow and which will not apply to its lawyers. Such authority very likely will lead to serious problems for disciplinary counsel in enforcing the ethical rules insofar as Justice Department attorneys are concerned and will undermine the authority of the bar disciplinary agencies.

ARGUMENT

I.

THE JUSTICE DEPARTMENT'S LAWYERS SHOULD BE HELD TO THE SAME ETHICAL STANDARDS AS ALL OTHER ATTORNEYS

Regulation of attorneys has traditionally been a function of the fifty-one states.[2] While the American Bar Association has sought to provide a national set of standards, first through the Model Code of Professional Responsibility[3], and then through the Model Rules of Professional Conduct[4], there is no national set of rules. Each state has chosen to adopt some version of the ABA's model code and rules with modifications.[5] Ethical codes for lawyers are adopted by the states, usually through their highest courts, by rule.[6]

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2. Coquillette and Leary, Working Papers of the Committee on Rules of Practice and Procedure, "Special Studies of Federal Rules Governing Attorney Conduct", Administrative Office of the United States Courts (September, 1997), p. 4.

3. American Bar Association, Model Code of Professional Responsibility, adopted originally by the ABA House of Delegates in August, 1969, and amended many times until the ABA adopted the Model Rules in 1983. *See* FN #4, ante.

4. American Bar Association, Model Rules of Professional Conduct, adopted originally by the ABA House of Delegates in August, 1983, and amended many times since, most recently in February, 2000.

5. Gillers and Simon, Regulation of Lawyers, Statutes and Standards, 2001, Aspen Publishers, pp. xxiii-xxiv.

6. *See, e.g.* Massachusetts Supreme Judicial Court Rule 3:07, 426 Mass. 1301 (1997), effective Jan. 1, 1998.

This Court has recognized the role of the states in adopting ethical codes for lawyers. *Nix v. Whiteside*, 475 U.S. 157 (1986).

The federal courts have not adopted separate ethical codes. Pursuant to the 1988 Amendments to the Rules Enabling Act, 28 U.S.C. § 2073, most of the U.S. District Courts[7] have incorporated state ethical codes for lawyers by reference.[8] A lesser number have adopted the ABA Model Rules by reference.[9] Still others have adopted both the relevant state standards and the ABA Model.[10] The benefit of federal courts adopting state ethical codes is to have one set of ethical rules in the jurisdiction for all lawyers. While the federal courts, through the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Standing Committee), have considered, and continue to have under consideration, either their own set of ethical rules for lawyers, or some specific changes in the ethical rules for federal courts, as of this time, the Standing Committee has rejected the idea of separate federal ethical rules.[11]

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7. According to Coquillette and Leary, (*See* FN #2 above), 76% of the federal districts with attorney conduct rules incorporate the relevant standards of the state in which the district is located, at p. 341.

8. *See, e.g.* Local Rule 83.6, D. Mass.

9. As of 1997, 9% of federal districts with attorney conduct rules had adopted the Model Rules. *See* Coquillette and Leary, op. cit., at p. 341.

10. As of 1997, 14% fit into this category. *See* Coquillette and Leary, at p. 341.

11. *See* "FRAC Models dated February 25, 2000", Administrative Office of the United States Courts, in which it is

(Cont'd)

Bar discipline involves the enforcement of the standards of professional conduct adopted in a jurisdiction. For bar discipline to operate effectively, it is critical that there be, within each jurisdiction, rules for lawyer regulation which apply to all lawyers in the jurisdiction. Where either the state court or the federal court has adopted professional conduct rules by the proper procedures, those rules should apply without distinction to all lawyers within that jurisdiction. While the ultimate objective of bar discipline is protection of the public, the "judiciary as well as the public is dependent upon professional ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex County Ethics Committee v. Garden State Bar Association, et al.*, 457 U.S. 423, 434 (1982). This Court's proper role only should extend to ensuring that the ethical standards imposed upon attorneys in federal court comply with federal law, *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992), do not infringe upon an individual's constitutional rights, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and that the procedures adopted for the enforcement of the disciplinary rules do not violate the right to due process of law. *In re Ruffalo*, 390 U.S. 544 (1968)

There is little dispute that evenhandedness in compliance with professional standards is a laudable goal. The desirability of equal application of the ethical rules for all attorneys within a jurisdiction recently was recognized by the United States Congress, when it enacted a bill entitled,

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(Cont'd)
noted that "(T)he theme common to all these (FRAC) variations is that all district courts and courts of appeal would look to state law for rules of professional responsibility." at p. 1.

"Ethical standards for attorneys for the Government." (McDade Amendment). This legislation provides that:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state. 28 U.S.C. § 530(B)

The Conference of Chief Justices, in 1994, expressed a similar view when it passed a resolution stating, *inter alia*, the following:

> (3) Without regard to the adoption of the Proposed Rule by the Attorney General, the Conference respectfully urges each of its members to continue to enforce the ethical rules upon *all members of bars* of the various states and jurisdictions. (*emphasis added*)[12]

This organization previously has expressed the same view in a letter to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, by stating that allowing federal prosecutors to operate under different rules would "pre-empt the enforcement mechanisms established by the Courts to oversee the professional conduct of attorneys admitted before the various high courts.[13] In this amicus brief, the NOBC

12. Forty-sixth Annual Meeting of the Conference of Chief Justices, Resolution XII, "Proposed Rule Relating to Communications with Represented Persons", August 4, 1994.

13. Letter of Michael J. Oths, President, National Organization of Bar Counsel, Bar Counsel, Idaho State Bar, to the Honorable (Cont'd)

strongly urges this Court to recognize that it is of critical importance to the effective functioning of bar disciplinary enforcement that the ethical rules within a jurisdiction are applied without any distinctions and evenhandedly, regardless of the position or the status of the lawyer.

ARGUMENT

II.

FEDERAL PROSECUTORS SHOULD NOT BE ABLE INDEPENDENTLY TO SELECT THE ETHICAL RULES THEY WILL FOLLOW

This is not the first time that a conflict has arisen on the issue as to whether federal prosecutors must follow state court or federal court adopted ethical rules. The United States Justice Department previously has issued its own regulations regarding what procedures its lawyers should follow with regard to Model Rule 4.2, the rule prohibiting contact with a represented person. The Justice Department's own rule provides as follows:

> A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for

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(Cont'd)
Orrin Hatch, Chair Senate Committee on the Judiciary, dated March 10, 1999, reprinted in "The Effect of State Ethics Rules on Federal Law Enforcement," Hearing before the Subcommittee on Criminal Justice Oversight of the Committee on the Judiciary, United States Senate, One Hundred Sixth Congress, First Session, March 24, 1999, pp. 103-106.

> purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high-level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter. 28 C.F.R. § 77.10(a)[14]

The majority of courts generally have held that such regulations do not have the force of law. *See, e.g. United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998).

Other attempts by the Justice Department to exempt its lawyers from ethical rules that all other lawyers must obey have come under justifiable criticism. In the hearings held on the McDade Amendment, the Conference of Chief Justices objected to any exemption when it submitted to the Hearing Committee a Resolution it adopted unanimously on August 4, 1994, stating in pertinent part as follows:

> (5) The state supreme courts cannot permit one class of lawyers (in this case lawyers employed by the Department, an agency of the executive branch of the federal government), unilaterally to exempt itself from the ethical rules imposed upon all lawyers by the judiciary

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14 . This rule began as a policy issued in a Memorandum from United States Attorney General Richard Thornburgh to All Justice Department Litigators, June 8, 1989. It was subsequently promulgated as a rule issued pursuant to 5 U.S.C. § 301 by the Attorney General of the United States.

imposed upon all lawyers by the judiciary of each state and the local federal district courts.[15]

The American Bar Association's Committee on Professional Ethics also has criticized the Justice Department's attempts to exempt its lawyers from selected ethical rules. The Committee has stated that it is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters, including both federal and state prosecutors. While the Justice Department has argued, inter alia, that because the Rule applies to a lawyer only "[i]n representing a client," the Rule does not reach the conduct of a prosecutor since she does not represent a "client" in the ordinary sense, the history of the Rule and its predecessors offers no support for any assertion that it was intended to exempt prosecutors. ABA Formal Opinion 95-396 (1995)

Several federal district courts have reported problems with federal agencies that have promulgated their own attorney conduct rules when those rules conflict with the local rules adopted by the U.S. District Courts.[16] While the problems so far have been limited to Rule 4.2 and Rule 3.8, there are other rules that NOBC is concerned may be susceptible to independent interpretation by the Justice Department. For example, in an effort to protect confidential

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15. "Ethical Standards for Federal Prosecutors Act of 1996", Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, One Hundred Fourth Congress, Second Session, on H.R. 3386, September 12, 1996, U.S. Government Printing Office, Washington: 1997 at p. 64.

16. Coquillette and Leary, op. cit., at p. 387.

informants or cooperation agreements that the government does not want revealed, *see, e.g.*, *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), the Justice Department could issue its own interpretation of Model Rule 3.3, requiring a lawyer not to make false statements of material fact to a court or to fail to disclose a material fact to a court. It also could formulate its own interpretation of Model Rule 3.4(f), which prohibits a lawyer from requesting a person other than a client to refrain from voluntarily giving relevant information to another party. *See, e.g.*, *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966)[17] These are but two example of possibilities where great mischief could be created with regard to independent interpretations of the ethical rules.

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17. *See also* 90 ALR 3d 1231 for a compilation of cases, statutes, and ethical rules relating to interference with interrogation of witnesses.

CONCLUSION

It is the responsibility of NOBC's members to safeguard the integrity of the legal profession within their jurisdictions. It will be impossible to fulfill this duty where one group of lawyers are unconstrained by the ethical rules they chose not to obey. Bar disciplinary agencies only can operate effectively if all the lawyers within their jurisdiction must abide by all the same rules. Without such evenhandedness of enforcement, the public interest and the reputation of the bar will be tarnished. If the First Circuit's decision stands, there is a substantial likelihood that bar discipline will be compromised seriously. For that reason, and the reasons stated above in our Arguments, NOBC urges this Court to grant certiorari on this case.

Respectfully submitted,

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Nos. 00-425 and 00-444

In the Supreme Court of the United States

DANIEL C. CRANE, PETITIONER

v.

DONALD K. STERN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

v.

DONALD K. STERN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether Local Rule 3.8(f), which was adopted by the United States District Court for the District of Massachusetts to govern subpoenas directed to attorneys in grand jury or other criminal proceedings, exceeded the district court's rulemaking authority.

2. Whether a court of appeals may require the affirmative vote of a majority of all active circuit court judges to rehear a case en banc under 28 U.S.C. 46(c), regardless of whether one or more of those judges have recused themselves from consideration of the en banc petition.

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In the Supreme Court of the United States

No. 00-425

DANIEL C. CRANE, PETITIONER

v.

DONALD K. STERN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

v.

DONALD K. STERN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a[1]) is reported at 214 F.3d 4. The opinion of the district court (Pet. App. 32a-50a) is reported at 184 F.R.D. 10.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2000. A petition for rehearing was denied on

[1] All references to "Pet. App." are to the appendix to the petition for a writ of cetiorari in No. 00-425.

June 22, 2000 (Pet. App. 27a-28a). The petition for a writ of certiorari in No. 00-425 was filed on September 18, 2000, and the petition for a writ of certiorari in No. 00-444 was filed on September 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the authority of a district court to promulgate a local district court rule. The United States District Court for the District of Massachusetts, pursuant to its authority under 28 U.S.C. 2071[2] and Federal Rule of Criminal Procedure 57(a)(1)[3], promulgates local rules to govern its day-to-day business. Under Local Rule 83.6(4)(B), conduct of federal prosecutors admitted to practice before the District Court that "violate[s] the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and shall be

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[2] Section 2071 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> * * * * *
>
> (f) No rule may be prescribed by a district court other than under this section.

[3] Federal Rule of Criminal Procedure 57(a)(1) provides in pertinent part:

> Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072.

grounds for discipline." Rule 83.6(4)(B) also allows the district court to opt out of any particular Massachusetts rule "by specific rule of this court."

In 1997, the Supreme Judicial Court for the Commonwealth of Massachusetts amended Rule 3.8 of the Massachusetts Rules of Professional Conduct to provide in pertinent part:

> The prosecutor in a criminal case shall:
>
> * * * * *
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (iii) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.[4]

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[4] As quoted in text, the Rule was identical to the 1990 American Bar Association (ABA) Model Rule of Professional Conduct 3.8(f). ABA Standing Committee on Ethics and Professional Responsibility and Section of Criminal Justice, Report 118, at 1 (1990). The ABA rule, however, was accompanied by a comment stating that "an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are

Pet. App. 3a-4a.

Respondent Donald K. Stern, the United States Attorney for the District of Massachusetts, asked the district court not to adopt Rule 3.8(f) via Local Rule 83.6(4)(B). The District Court declined the request, and Rule 3.8(f) as adopted went into effect in the district court on January 1, 1998. Pet. App. 5a.

On May 13, 1998, respondent filed in the United States District Court for the District of Massachusetts a complaint for declaratory and injunctive relief against the district court, the judges of the district court, and Bar Counsel for the Board of Bar Overseers for the Commonwealth of Massachusetts, an attorney who enforces the Massachusetts Rules of Professional Conduct.[5] Respondent alleged that Local Rule 3.8(f)

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met." Pet. App. 4a. That comment was not included with the Massachusetts rule.

As the court of appeals noted, "[a]fter the Third Circuit struck down a bar rule patterned on [ABA] Model Rule 3.8(f), * * * the ABA retreated: it removed the judicial preapproval requirement by deleting both subparagraph (2) and the second sentence of the comment." Pet. App. 4a (citing *Baylson* v. *Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993)). Indeed, the ABA committee that recommended the change in 1995 noted that there was "a fundamental and widespread doubt about the suitability of Rule 3.8(f) in its current form as a rule of ethics," and that subparagraph (2) in particular "is an anomaly" because "it sets out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm" and "while nominally addressed to the conduct of the prosecutors, subparagraph (2) affects the operation of courts and grand juries." ABA, Standing Committee on Ethics and Professional Responsibility, *Report with Recommendation to the House of Delegates* 7-8 (Aug. 1995).

[5] Originally, Craig C. Donsanto, a member of the Massachusetts bar and Director of the Election Crimes Branch in the Criminal Division of the United States Department of Justice,

exceeded the district court's rulemaking authority under Section 2071 and Federal Rule of Criminal Procedure 57(a)(1), because the Rule is not consistent with two provisions of the Federal Rules of Criminal Procedure. Specifically, respondent claimed that the requirement in Rule 3.8(f)(2) of "prior judicial approval after an opportunity for an adversarial proceeding" conflicts with Federal Rule of Criminal Procedure 6(e), which requires grand jury secrecy, and Federal Rule of Criminal Procedure 17, which governs the issuance of grand jury subpoenas. Respondent informed the court

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joined as a plaintiff in the action. Donsanto was to represent the interests of those federal prosecutors who were members of the Massachusetts bar practicing outside Massachusetts and who therefore might be subject to State Rule 3.8(f) based on subpoenas issued in other jurisdictions. Also, plaintiffs originally named as defendants the Massachusetts Board of Bar Overseers and the Supreme Judicial Court for the Commonwealth of Massachusetts, the state bodies that would hear a state action brought by Bar Counsel under Rule 3.8(f). Pet. App. 5a-6a.

By affidavit dated June 17, 1998, then-Bar Counsel Arnold R. Rosenfeld (petitioner Crane's predecessor) stated that he would initiate any Rule 3.8( ) proceedings against federal prosecutors "pursuant to the applicable Local Rules of [the United States District Court], not before the Board of Bar Overseers or a state court." C.A. App. 98. He also stated that "[p]rosecutors who are members of the bar of the Commonwealth of Massachusetts practicing in a state or federal court outside the Commonwealth who direct the service of a subpoena on a lawyer seeking information about a client will not face any disciplinary action by the Board of Bar Overseers based on Rule 3.8(f)." *Id.* at 99; see Pet. App. 6a. The Supreme Judicial Court for the Commonwealth of Massachusetts then filed a Stipulation of Facts stating that it would hear a 3.8(f) action only as an appeal from the Board of Bar Overseers. C.A. App. 82. Based on those representations, the parties stipulated to the dismissal of Donsanto, the Board, and the Supreme Judicial Court. See *id.* at 101, 102-103.

that his office had suspended the issuance of attorney subpoenas in light of the Rule. Pet. App. 5a.

2. On October 21, 1998, Congress passed an Act entitled Ethical Standards for Attorneys for the Government, and known as the Citizens' Protection Act, Pub. L. No. 105-277, § 801, 112 Stat. 2681-118. The Act is now codified at 28 U.S.C. 530B (Supp. IV 1998). The Act provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

3. Because all of the district court judges in the District of Massachusetts were named defendants, they were all recused from presiding over the case. C.A. App. 80; see 28 U.S.C. 455(b)(5)(i). Judge Brody of the United States District Court for the District of Maine was designated to preside instead. C.A. App. 81. On January 20, 1999, the district court issued an order and memorandum denying respondent's motion for a preliminary and permanent injunction and for declaratory relief. Pet. App. 32a-50a. Based on that order and memorandum, the court later entered a final judgment for petitioners. C.A. App. 142.

In its order and memorandum, the district court first construed Rule 3.8(f). It noted that Rule 3.8(f) has two parts: Rule 3.8(f)(2), which requires an adversary hearing before a subpoena could be served on an attorney, and Rule 3.8(f)(1), which requires the prosecutor to have a reasonable belief that the information sought is not privileged, that the evidence sought is essential, and that there is no feasible alternative to the subpoena to obtain the evidence. Pet. App. 42a. The court noted that petitioners "do not seriously challenge [respon-

dent's] assertion that Rule 3.8(f) was invalidly adopted if Rule 3.8(f)(2) incorporates the requirements of Rule 3.8(f)(1)," *i.e.*, if the issue at the Rule 3.8(f)(2) adversary hearing is whether the subpoena satisfies the substantive standards of Rule 3.8(f)(1). *Ibid.* The district court, however, adopted state Bar Counsel's contrary interpretation of the Rule, finding that the Rule "does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2)." *Id.* at 43a. The court also noted that the judges of the district court had themselves refused to construe the Rule, but that "[t]o the extent that [respondent's] requests for * * * relief are premised on the *possibility* that other courts will interpret Rule 3.8(f) differently * * * such conflicts appropriately may be resolved at the Circuit level." *Id.* at 44a-45a.

In light of that interpretation of Rule 3.8(f), the district court concluded that the Rule does not conflict with existing federal law. The court noted that the First Circuit had already approved a local rule requiring prior judicial approval—but not imposing any new substantive standards—before a prosecutor could subpoena an attorney in a criminal case.[6] Pet. App. 46a.

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[6] In *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1995), the First Circuit upheld a state court rule adopted as a local district court rule by the United States District Court for the District of Rhode Island. The rule provided:

> The prosecutor in a criminal case shall * * * not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

And it decided that the adversarial hearing required by Rule 3.8(f)(2) would "present no more risk of disclosure than did former practice under Rule 3.08 or present practice on a motion to quash" and would therefore not threaten grand jury secrecy. *Id.* at 47a.

The district court adverted to Section 530B briefly at the conclusion of its opinion, stating that "the enactment of 28 U.S.C. [530B] signals Congress's * * * desire that the states and the federal courts play a greater role in governing the conduct of government attorneys." Pet. App. 50a. But the court also acknowledged that "[i]f Rule 3.8(f) is inconsistent with the Federal Rules of Criminal Procedure or federal common law governing a district court's power to regulate a grand jury, as [respondent] alleges, it cannot legitimately be adopted by the District Court," because "section 530B cannot empower district courts to adopt rules governing the behavior of attorneys that squarely conflict with * * * federal law." *Id.* at 37a-38a n.14.

4. The court of appeals reversed. It rejected the district court's "artificial construction" of Local Rule 3.8(f), holding that the Rule required that an attorney

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Id. at 1366. The rule also included a comment stating that "prior judicial approval should be withheld unless" the subpoena satisfies essentially identical standards to those imposed by Rule 3.8(f)(1) of lack of privilege, essentiality, and lack of feasible alternatives. *Ibid.* The First Circuit upheld the Rhode Island rule, but only after concluding that the substantive standards mentioned in the comment are not part of the rule and need not be satisfied for a subpoena to be valid. See *id.* at 1357 (stating that the Rhode Island rule "merely authorizes district courts to reject a prosecutor's attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena"); see also *id.* at 1358 n.12 ("To the extent that the Comment * * * suggests a broader basis for rejecting a subpoena application, we point out that the Comment cannot substantively change the text of the Rule.").

establish the substantive standards of 3.8(f)(1) at the adversarial hearing provided in 3.8(f)(2). Pet. App. 13a. The court of appeals noted that the Rule must be construed as a "unified whole," *ibid.*, and that "the original drafters certainly intended that the two subparagraphs * * * be harmonized, not balkanized," *id.* at 14a. It also observed that the provision for an adversarial hearing would serve "no purpose" if "courts evaluated subpoena applications solely on the basis of traditional motion-to-quash standards." *Ibid.* Since the rule requires an adversarial hearing, "the targeted attorney would have to be told in advance of the content of the testimony or materials sought," thereby "driv[ing] a wedge of distrust between lawyer and client." *Ibid.* The net result "would mirror existing quashal procedure and generate no ethics benefits whatsoever." *Ibid.* Finally, the court observed that it was doubtful that Bar Counsel's "litigation position [regarding the meaning of the Rule] is entitled to any deference," *id.* at 15a, that the district court judges charged with applying the Rule had "pointedly refused to endorse" the interpretation offered by Bar Counsel and adopted by the district court, *ibid.*, and that "any deference that might normally be due is overcome here by the availability of a much more logical reading and a clear statement of the drafters' intent." *Id.* at 15a-16a.

Under the proper interpretation of Local Rule 3.8(f), the court of appeals concluded that the Rule exceeded the district court's rulemaking authority. The court held that the Rule creates "new substantive requirements for judicial preapproval of grand jury subpoenas," and in so doing, "alters the grand jury's historic role, places it under overly intrusive court supervision, curbs its broad investigative powers, reverses the presumption of validity accorded to its subpoenas,

undermines the secrecy of its proceedings, and creates procedural detours and delays." Pet. App. 18a-19a. The court emphasized that this Court had held that "the government could not be required to demonstrate that the materials sought by a grand jury subpoena were relevant," *id.* at 19a (citing *United States* v. *R. Enters., Inc.*, 498 U.S. 292 (1991))—a holding in conflict with the provision of Rule 3.8(f) "[r]equiring a prosecutor to show that subpoenaed evidence is essential and not otherwise feasibly obtainable," *ibid.*

The court of appeals also held (Pet. App. 19a-24a) that Local Rule 3.8(f) was beyond the district court's rulemaking power even outside the grand jury context, because it addressed more than the mere "matters of detail" authorized by Federal Rule of Criminal Procedure 57(a)(1). See Fed. R. Crim. P. 57 advisory committee's notes, cmt. 2; *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960). The requirements of Rule 3.8(f) that a prosecutor establish "essentiality" and "no feasible alternative," the court held, "work changes too fundamental" in the standards governing trial subpoenas under Federal Rule of Criminal Procedure 17 to withstand scrutiny. Pet. App. 21a. Moreover, the court concluded, the Rule would impose "novel requirements that threaten to preclude the service of otherwise unimpeachable subpoenas and thus restrict the flow of relevant, material evidence to the factfinder." *Id.* at 22a.[7]

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[7] As an example of the "fairly typical * * * situation in which a prosecutor might wish to serve an attorney subpoena," the court cited a subpoena seeking billing information from a defense attorney who "received a lump-sum advance payment for services in the precise amount of * * * purloined funds from a client with no visible means of support," where there is "other evidence linking the client to the robbery, so the billing information could

The court of appeals also examined the impact of Section 530B. The court rejected Bar Counsel's arguments that Section 530B "cures any conflict between Local Rule 3.8(f) and other federal law," Pet. App. 24a, explaining that "it simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law," *id.* at 24a-25a. The court also held that "Section 530B applies only to ethical standards," and that Local Rule 3.8(f) "is more than an ethical standard" because "[i]t adds a novel procedural step—the opportunity for a pre-service adversarial hearing—and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind." *Id.* at 26a. The court also noted that the ABA committee that recommended repeal of the Rule 3.8(f) provision for an adversary hearing, see note 4, *supra*, acknowledged that "[r]ather than stating a substantive ethical precept, [the Rule sets] out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm." *Id.* at 26a-27a (quoting ABA Standing Committee on Ethics and Professional Responsibility, Report 101, at 7 (Aug. 1995)).

5. The court of appeals denied a petition for rehearing en banc filed by petitioners here. Judge Torruella filed an opinion dissenting from denial of rehearing en banc, joined by two other judges. Pet. App. 28a-31a.

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not fairly be described as 'essential' to the prosecution." Pet. App. 22a. The court explained that "Local Rule 3.8(f) would prohibit the prosecutor from serving a subpoena on the defense attorney, notwithstanding the unarguable materiality and relevancy of the retainer information." *Ibid.*

Judge Torruella stated his belief that the panel opinion was inconsistent with the First Circuit's previous decision in *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1995). Pet. App. 28a-30a. He also noted that, under the First Circuit's decision in *United States* v. *Leichter*, 167 F.3d 667 (1999), "recused judges are counted for purposes of determining what constitutes the absolute majority of the active members deemed necessary for en banc hearing." Pet. App. 28a. The First Circuit has six judges in active service, and the votes of four judges are accordingly necessary to obtain rehearing en banc. Judge Lynch was recused, *id.* at 27a, and the two active judges on the panel apparently did not vote to grant rehearing en banc. The votes of the three judges joining in the dissenting opinion were therefore insufficient to grant the suggestion for rehearing en banc.

ARGUMENT

Petitioners contend that, even given the holding of the court of appeals (which they do not challenge) that Rule 3.8(f) conflicts with the requirements of the Federal Rules of Criminal Procedure, 28 U.S.C. 530B renders Rule 3.8(f) valid and enforceable as a regulation of ethics of government attorneys. 00-425 Pet. 10-20; 00-444 Pet. 11-16. Bar counsel also seeks review of the court of appeals' interpretation of Rule 3.8(f). 00-425 Pet. 20-21. Petitioners' claims do not warrant further review.

1. Petitioners claim (00-425 Pet. 10; 00-444 Pet. 14) that this Court should review the court of appeals' determination that Local Rule 3.8(f) is not an "ethical standard" within the scope of Section 530B. They assert that the court of appeals' conclusion creates a conflict with *United States* v. *Colorado Supreme Court*,

189 F.3d 1281 (10th Cir. 1999), which will "allow[] federal prosecutors in Massachusetts to serve subpoenas to lawyers under circumstances that would subject federal prosecutors in Colorado to professional discipline." 00-425 Pet. 10. That contention is incorrect.

a. The court of appeals held that Rule 3.8(f) is not an "ethical standard" within Section 530B because it conflicts with the uniform federal requirements governing subpoena practice in the Federal Rules of Criminal Procedure, interferes with the grand jury, and imposes procedural and substantive requirements on federal practice that extend far beyond the "realm of ethics." Pet. App. 24a-27a. The court found support for that conclusion in the acknowledgement of the ABA that requirements for a judicial hearing and substantive prerequisites for issuance of a subpoena are matters to be "properly established by rules of criminal procedure rather than established as an ethical norm." *Id.* at 27a (quoting ABA Standing Committee, *supra*, at 7).

That holding does not conflict with the holding in *Colorado Supreme Court.* There, the Tenth Circuit addressed a Colorado state rule (adopted by the United States District Court for the District of Colorado as part of its local rules, see 189 F.3d at 1283) governing the issuance of attorney subpoenas. The rule contained substantive standards governing attorney subpoenas in criminal cases that were identical to those in Rule 3.8(f)(1). The rule differed from Rule 3.8(f), however, in important respects. Based on an unappealed district court holding that the Colorado rule's application to the grand jury setting would violate the Supremacy Clause, the Colorado rule as it came before the Tenth Circuit had no application to the grand jury setting. 189 F.3d at 1284. That setting is the primary one in which issues regarding attorney subpoenas arise, and there is plainly

no disagreement between *Colorado Supreme Court* and the decision in this case, see Pet. App. 15a-17a, concerning the application of attorney subpoena rules in that important setting. In addition, as the Tenth Circuit noted, the Colorado rule at issue in *Colorado Supreme Court* did not include a provision for an adversarial hearing, as does Local Rule 3.8(f). 189 F.3d at 1284.

The Tenth Circuit held in *Colorado Supreme Court* that "the question whether [the Colorado rule] violates the Supremacy Clause * * * turns on whether the rule is a rule of professional ethics clearly covered by [Section 530B], or a substantive or procedural rule that is inconsistent with federal law." 189 F.3d at 1284. The court held that the Colorado rule was "a rule of professional ethics," relying on an analysis that classified the rule as an ethical one if it bars conduct "recognized by consensus within the profession as inappropriate," reads "like a commandment dealing with morals and principles," is "quite vague in its nature" in contrast to rules of substantive or procedural law, and "is directed at the attorney herself." *Id.* at 1287. The Tenth Circuit did not consider whether the Colorado rule would alter rules of practice, procedure, or evidence in federal courts or conflict with federal statutes or duly promulgated federal judicial rules. Cf. 28 C.F.R. 77.1(b) (stating that Section 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law").

While we disagree with the analysis and result in *Colorado Supreme Court*, it does not conflict with the First Circuit's decision in this case. The court of appeals in this case held that Local Rule 3.8(f) could not qualify as an "ethical standard" under Section 530B because it added the "novel procedural step" of an

adversarial hearing, and "compound[ed] the matter" by imposing new substantive standards on the issuance of subpoenas. Pet. App. 26a. The Colorado rule at issue in *Colorado Supreme Court*, however, did not require an adversary—or any—hearing. Indeed, the Tenth Circuit relied on that fact in concluding that the Colorado rule was valid, explaining as one basis for holding that the Colorado rule was a rule of ethics that it "does not concern itself with the actual procedural steps to satisfy the rule." 189 F.3d at 1288. Accordingly, the Tenth Circuit did not pass on a rule like Rule 3.8(f), and its holding in *Colorado Supreme Court* does not mean that it would conclude that Rule 3.8(f), with its requirement for an adversary hearing, is a rule of ethics.[8]

b. Petitioner Crane argues that further review is warranted because the court of appeals "ignore[d] the plain language of [Section 530B]." 00-425 Pet. 13. Petitioner does not appear to disagree with the court of appeals' conclusion that Section 530B "applies only to ethical standards." Pet. App. 26a. See, *e.g.*, 00-425 Pet. 14 ("[Section 530B] represents the first time Congress has specifically addressed the question of the ethical standards that federal lawyers must obey."). He does disagree with the court of appeals' conclusion that Rule 3.8(f) is not such an "ethical standard." That disagreement, however, cannot be resolved by appeal to the "plain language of [Section 530B]." Indeed, petitioner

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[8] Petitioner Crane also claims (00-425 Pet. 12) that the court of appeals' decision conflicts with its own opinion in *Whitehouse* v. *United States District Court for the District of Rhode Island*, *supra*. The court of appeals in this case distinguished *Whitehouse*, see Pet. App. 17a-18a, rather than overruling it. In any event, further review would not be warranted to resolve an intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

himself offers no alternative to the court of appeals' explanation that Rule 3.8(f) cannot be viewed as a mere rule of ethics, because it imposes new procedural requirements on federal courts and new substantive requirements on the issuance of subpoenas in federal grand jury and other criminal proceedings.[9]

Petitioner Crane asserts that "[i]n enacting [Section 530B], Congress clearly meant to require federal prosecutors to conform their behavior to state and local district court ethical rules even in situations where those rules present some degree of conflict with pre-existing federal law." 00-425 Pet. 18. The court of appeals in this case stated that Section 530B does not "grant[] states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law," Pet. App. 25a, although its decision also rested on the ground that Rule 3.8(f) was not a genuine rule of ethics under Section 530B in any event, see Pet. App. 26a. No other court of appeals has reached a contrary conclusion regarding the effect of an ethics rule under Section 530B that conflicts with some other federal rule or statute. The only other court of appeals decisions to address Section 530B are *United States* v. *Colorado*

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[9] The court of appeals' opinion does not render Section 530B "superfluous," as petitioner Crane contends. 00-425 Pet. 13. Many state or district court ethical rules do not conflict with any federal law and therefore clearly govern federal attorneys under Section 530B. The mere labeling of a rule by state authorities or a federal district court as an "ethical standard," however, does not make it one. And nothing suggests that Congress intended in Section 530B to give federal district courts (and state authorities) the power to alter or displace fundamental substantive, procedural, and evidentiary rules in federal courts by adopting "ethical rules" governing attorneys in federal courts.

Supreme Court, supra; *United States* v. *Lowery*, 166 F.3d 1119 (11th Cir.), cert. denied, 528 U.S. 889 (1999), and *United States* v. *Condon*, 170 F.3d 687 (7th Cir.), cert. denied, 526 U.S. 1126 (1999). The court in *Colorado Supreme Court* addressed only the question whether the rule at issue in that case was a rule of ethics under Section 530B, and it did not discuss whether the rule before it conflicted with any provision of federal law. See 189 F.3d at 1284. In *Lowery*, the Eleventh Circuit held that a district court could not exclude evidence otherwise admissible under the Federal Rules of Evidence on the basis that it was obtained in violation of a state court "ethical" rule. Accord *Condon*, 170 F.3d at 690 ("Like the eleventh circuit in *Lowery*, we doubt that a [district court's] local rule can require the exclusion of evidence."). Thus, *Lowery* and *Condon* provide support for the court of appeals' conclusion that Section 530B does not authorize a district court to apply a rule that conflicts with existing federal law.

c. Petitioners United States District Court et al. claim that Section 530B "require[s] federal prosecutors to abide by *state* rules governing attorney conduct that are inconsistent with other federal law or rules." 00-444 Pet. 12 (emphasis added). Petitioners argue that, because state prosecutors are required to abide by the Massachusetts Rule of Professional Responsibility governing attorney subpoenas, the rule governs federal prosecutors appearing in federal court, regardless of whether the federal court has adopted or is authorized to adopt the rule as a local district court rule under federal statutory law and the Federal Rules of Criminal Procedure.

Petitioners' claim is not properly before the Court. As explained above, see note 5, *supra*, petitioner Bar

Counsel stated that he would initiate proceedings under Local Rule 3.8(f) only "pursuant to the applicable Local Rules [the United States District Court for the District of Massachusetts], not before the Board of Bar Overseers or a state court." C.A. App. 98. Respondent Stern expressly relied on that statement to dismiss from this action both the Supreme Judicial Court of Massachusetts and the Board of Bar Overseers, the two entities authorized to consider proceedings under the Massachusetts Rules of Professional Responsibility. See *id.* at 101, 102 (dismissals were "based upon the Affidavit of [Bar Counsel]"). The only issue presented to or decided by either court below was therefore whether the United States District Court for the District of Massachusetts has the power to promulgate Local Rule 3.8(f) as a local district court rule. No question regarding the independent force or effect of the state bar rule is properly before this Court.

2. Petitioner Crane claims (00-425 Pet. 20-21) that this Court should review the court of appeals' interpretation of Local Rule 3.8(f), because by "reject[ing] a construction of the rule * * * that would have preserved its validity," the court has "ignore[d] the approach that every other court has tak[en]" to evaluating local district court rules. As the court of appeals noted (Pet. App. 16a), however, there is a point at which a court cannot cure a conflict between a district court rule and federal statutes and rules by interpretation. Even in the far more delicate context in which the rule of constitutional doubt applies—a context that, as the court of appeals noted, "implicate[s] separation of powers or countermajoritarian concerns" not present here, *ibid.*—this Court has repeatedly emphasized that "[a]voidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice*

Cream Co. v. *Rose*, 289 U.S. 373, 379 (1933). See, *e.g.*, *Miller* v. *French*, 120 S. Ct. 2246, 2255 (2000); *United States* v. *Locke*, 471 U.S. 84, 96 (1985). Likewise, a court of appeals cannot ignore the plain meaning of a local district court rule to preserve its validity under Section 2071.

In this case, the court of appeals concluded that both the plain meaning of Local Rule 3.8(f) and the drafters' intent dictated reading the Rule to require the establishment of Rule 3.8(f)(1)'s substantive standards at the adversarial hearing prescribed in Rule 3.8(f)(2). A contrary reading, the court held, would not resolve some latent ambiguity, but would instead render Rule 3.8(f)(2) a nullity.[10]

Petitioner points to no case, and we have found none, in which a court of appeals interpreted a district court rule contrary to its plain language. See *John* v. *Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985) ("Obviously, a local rule that is inconsistent *on its face* with the Federal Rules cannot stand." (emphasis added)). The court's refusal to place an "artificial" construction on Local Rule 3.8(f), Pet. App. 13a, in order to preserve its validity, therefore, does not conflict with any other circuit court decision and is in accord with the decisions of this Court.

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[10] The cases relied on by petitioner Crane (Pet. 20-21) all involve ambiguous rules that were clearly open to alternative interpretations. See *Marshall* v. *Gates*, 44 F.3d 722, 725 (9th Cir. 1995) (interpreting a local rule to place a condition on a right guaranteed by federal rules, not to eliminate it altogether); *Jaroma* v. *Massey*, 873 F.2d 17, 20 (1st Cir. 1989) (interpreting the phrase "the court may act on the motion" to allow particular actions, but not others); *John* v. *State of Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985) (refusing to read into local rule a sanction that was not explicitly provided and that would conflict with Federal Rules).

Petitioner Crane also suggests (00-425 Pet. 21) that by failing to adopt the district court's interpretation, the court of appeals did not give proper deference to the district court judges that promulgated the rule. The judges of the United States District Court for the District of Massachusetts, however, specifically *declined* to interpret Local Rule 3.8(f) in the courts below, see Pet. App. 15a, and they do not challenge the court of appeals' interpretation in this Court. Instead, the district court's interpretation was based on the proffer of state Bar Counsel, a litigating position that, as the court of appeals correctly held (*ibid.*), deserves no deference.

In any event, further review would not be warranted to determine whether the court of appeals correctly construed the particular local rule at issue in this case. No other court of appeals has addressed the correct interpretation of that rule. Moreover, if petitioners disagree with the court of appeals' construction of Rule 3.8(f), they retain the authority to promulgate a new rule that clearly embodies whatever lawful construction they prefer.

3. Finally, petitioners United States District Court et al. argue (00-444 Pet. 16) that this Court should review the court of appeals' denial of petitioners' request for rehearing en banc. Further review of that issue is not warranted.[11]

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[11] It is noteworthy that, although Judge Torruella, joined by two other judges, dissented from denial of rehearing en banc in this case and referred to the First Circuit's rule requiring an absolute majority of active judges to grant a petition for rehearing en banc, he did not suggest that that rule was wrong or should be changed. In a similar circumstance involving a decision of the Eleventh Circuit denying rehearing en banc, Judge Carnes recently argued extensively that "there is no good reason why a uniform rule

The First Circuit requires the vote of a majority of all active judges to rehear a case en banc, regardless of whether one or more have recused themselves from consideration of the petition. See *Leichter*, 167 F.3d at 667. The court based that rule on its construction of 28 U.S.C. 46(c), which provides that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered *by a majority of the circuit judges of the circuit who are in regular active service*" (emphasis added). See also Fed. R. App. P. 35(a) ("A majority of the circuit judges *who are in regular active service* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.") (emphasis added). In this case, as in *Leichter*, the petition for rehearing en banc failed to garner a majority vote. As petitioners correctly note (00-444 Pet. 17), several other, larger circuits allow a case to be reheard en banc on the majority vote of only non-recused judges.

Petitioners concede (00-444 Pet. 18) that "this Court implicitly rejected the argument that the language of

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should not be followed in all the circuits" and that therefore "Rule 35(a) should be clarified *through amendment*." *Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1225 (11th Cir. 2000) (emphasis added); see also *id.* at 1221 (absolute majority rule "needs to be changed *by Congress or by the Supreme Court through the Rules Enabling Act*") (emphasis added). He did not, however, suggest that the Eleventh Circuit's absolute majority rule, which mirrors the rule followed by the First Circuit in this case, was incorrect as a matter of interpretation of the current governing statute and rule. (We have filed a petition for a writ of certiorari from the underlying decision of the court of appeals in *Gulf Power*, as has a private party. See *FCC* v. *Gulf Power Co.*, No. 00-843; *National Cable Television Ass'n* v. *Gulf Power Co.*, No. 00-832. Neither petition presents any question regarding the court's en banc procedure.)

§ 46(c) compels a specific method of vote-counting for determining whether a majority of judges in regular active service have ordered rehearing" (citing *Shenker* v. *Baltimore & Ohio Ry. Co.*, 374 U.S. 1 (1963)). In *Shenker*, the Court held that the absolute-majority rule used by the court of appeals here was "clearly within the scope of the court's discretion" and that to hold otherwise "would involve [the Court] unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5. See also *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 626 (1974); *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960).[12] Thus, petitioners' claim is foreclosed.

Petitioners ask (00-444 Pet. 19) that this Court "reexamine" *Shenker* because there are now more courts that grant en banc review based upon the decision of a majority of non-recused judges than there were when *Shenker* was decided. See *Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1222 (11th Cir. 2000) (Carnes, J., concerning the denial of rehearing en banc) (stating that five circuits now follow the absolute majority rule followed by the First Circuit here, while eight do not); see also note 11, *supra*. Petitioners do not explain, however, why that shift would require the Court to revisit its holding in *Shenker*. The same differences among local en banc procedure existed when *Shenker* was decided. The fact that fewer courts use the absolute-majority rule now

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[12] The problems with prescribing a uniform rule are obvious because the courts of appeals are themselves non-uniform. In the First Circuit, for instance, there are currently six active judges, while in the Ninth Circuit, there are nearly thirty. If the First Circuit were required to convene an en banc court upon the majority vote of only non-recused judges, therefore, the equivalent of a circuit panel (three judges) could force a rehearing en banc whenever even a single judge is recused.

does not affect the conclusion that the courts of appeals may differ on the appropriate rule to govern en banc procedure.[13]

Petitioners also suggest (00-444 Pet. 19) that the different local rules on en banc procedure have "creat[ed] the appearance of rights determined by happenstance" (quoting *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 920 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984)). A litigant, however, has no right to have his case heard by the entire court. See *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 252 (1953). Section 46(a) deals "not with rights, but with power." *Id.* at 259; see also *id.* at 250 (statute is "not addressed to litigants. It is addressed to the Court of Appeals."). It allows the court of appeals to oversee its own operations and to prevent internal conflict and incoherence. But it does not *require* the court of appeals to exercise the en banc power in certain situations; it only provides the power to do so if the court wishes. See *NLRB* v. *Cambria Clay Prods. Co.*, 229 F.2d 433 (6th Cir. 1955) (when original appeal was heard by panel of three regular Sixth Circuit judges,

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[13] Petitioners suggest (00-444 Pet. 19 n.9) that this Court should revisit *Shenker* because Congress has since passed "strict financial disqualification rules." Those rules were enacted in 1976. See *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 930 n.6 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984). Since then, this Court has consistently denied petitions for certiorari requesting review of the court of appeals' internal en banc procedures. See, *e.g.*, *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986), cert. granted limited to other grounds, 483 U.S. 1004 (1987), rev'd on other grounds, 485 U.S. 197 (1988); see also *In re American Broad. Cos.*, 464 U.S. 1006 (1983) (denying petition for writ of mandamus to force en banc review).

court would not consider rehearing case en banc); *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987) (rejecting argument that if so many judges recuse themselves that it is impossible for an absolute majority to vote for en banc rehearing, litigant is entitled to remedy allowing consideration of suggestion for en banc rehearing), cert. denied, 484 U.S. 1026 (1988). Thus, although a litigant may have a right of notice regarding the court's procedures and a right that the court follow them, *Shenker*, 374 U.S. at 5, he does not have the right to demand certain procedures.

Finally, petitioners complain (00-444 Pet. 20) that the First Circuit's rule "makes the important mechanism of en banc review too rare an occurrence." Before this Court's decision in *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326 (1941), however, it was unclear that the courts even had authority to convene en banc. And although en banc hearings are now widely accepted and approved by Section 46(a), "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered." Fed. R. App. P. 35(a); see also *American-Foreign S.S. Corp.*, 363 U.S. at 689 ("*En banc* courts are the exception, not the rule."). The Rules and the statute favor the infrequency of en banc review.[14]

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[14] This Court is not the only forum for evaluation of en banc rules. Under 28 U.S.C. 2071(c)(2), the Judicial Conference has the power to modify or abrogate rules promulgated by the courts of appeals. In addition, "general rules of practice and procedure" promulgated by this Court supersede "[a]ll laws in conflict with such rules." 28 U.S.C. 2072(a) and (b). If there is to be reconsideration of appellate en banc procedure, it should be undertaken in the context of a proposal to revise the federal rules, not on certiorari review of the court of appeals' decision in this case. See note 11, *supra*.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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